IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-866

VORNADO, INC., a corporation of the State of Delaware, t/a Two Guys; GERALD VITIELLO; JOSEPH HOPMAYER; STUART LEVINE; LOUIS MERCADO; THOMAS G. STRAMARA; and ALAN LEDDEN,

~~Plaintiffs~~ *Appellants,*

vs.

WILLIAM F. HYLAND,
Attorney General of the State of New Jersey,

~~Defendant-Respondent,~~

and

CITY OF HACKENSACK, TOWN OF KEARNY and MENSWEAR RETAILERS OF NEW JERSEY, INC.,

~~Defendants-Respondents,~~

and

BOROUGH OF LODI, CITY OF GARFIELD, TOWNSHIP OF NORTH BERGEN and CITY OF VINELAND,

~~Defendants.~~ APPELLEES

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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THE OPINIONS BELOW

The official opinions are the opinion of the trial court, reported at 148 N.J. Super. 343, 372 A.2d 667 (Law Div. 1977) and the opinion of the New Jersey Supreme Court is reported at 77 N.J. 347, 390 A.2d 606 (1978).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is an appeal from the decision of the New Jersey Supreme Court reported at 77 N.J. 347, 390 A.2d 606 (1978) holding *N.J.S.A.* 2A:171-5.8 *et seq.*, commonly known as the New Jersey Sunday Closing Law or Blue Law to be Constitutional. This proceeding is brought pursuant to 28 United States Code §1257(2).

The judgment sought to be reviewed is the opinion and judgment of the New Jersey Supreme Court of July 18, 1978, as well as the order entered on September 5, 1978, by the New Jersey Supreme Court dismissing appellants' petition for a rehearing.

Cases believed to sustain the jurisdiction of this Court are as follows:

McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961)

Gallagher v. Crown Kosher Super Market of Massachusetts, 366 U.S. 617, 81 S. Ct. 1122, 6 L.Ed.2d 536 (1961)

Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 81 S. Ct. 1135, 6 L.Ed.2d (1961)

Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 563 (1961)

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

The Statute in question, *N.J.S.A.* 2A:171-5.8, is set forth verbatim in Appendix B.

The judgment of July 18, 1978 is contained in the opinion annexed hereto as Appendix A and the order on rehearing is annexed hereto as Appendix C.

QUESTIONS PRESENTED BY THE APPEAL

I. The New Jersey Sunday Closing Law creates a series of classifications bearing no rational relationship to the State interest of keeping the highways clear and unobstructed so that citizens may find relief from the stress of everyday pursuits.

II. The New Jersey Supreme Court erred by holding and concluding that the evidence adduced by Appellant Vornado, Inc., failed to demonstrate that *N.J.S.A.* 2A:171-5.8 *et seq.*, was incapable of being enforced except in a discriminatory and selective manner in contravention of the equal protection of the law as guaranteed by the Fourtenth Amendment to the United States Constitution.

III. The New Jersey Supreme Court erred by holding and concluding that the classification of the items that could not be sold on Sunday was *not* unconstitutionally vague or ambiguous and in contravention of the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE FACTS OF THE CASE

The instant appeal challenges the constitutionality of *N.J.S.A.* 2A:171-5.8 *et seq.*, commonly known as the New Jersey Sunday Closing Law or Blue Law (hereinafter referred to as New Jersey Sunday Closing Law) pursuant to U.S. Constitution, Amendment XIV. While this Court has never passed upon the Constitutionality of the New Jersey Sunday Closing Law, this Court has passed upon the Constitutionality of the Sunday closing laws of the other States. *McGowan v. Maryland, supra* (Maryland); *Gallagher v. Crown Kosher Super Market of Massachusetts, supra* (Massachusetts); *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra* (Pennsylvania); *Braunfeld v. Brown, supra* (Pennsylvania).[1]

For example, however, the Pennsylvania Supreme Court, on October 5, 1978, held in *The Kroger Co., et al. v. O'Hara Township, et al.*, — Pa. —, — A.2d — (1978), that state's Sunday closing law to be unconstitutional under the Pennsylvania Constitution despite this Court's holding in *Two Guys from Harrison-Allentown, Inc., v. McGinley, supra,* and *Braunfeld v. Brown, supra.* In addition, as will be discussed *infra,* the New Jersey Sunday Closing Law is unique in that it has a county option provision (*N.J.S.A.* 2A:171-5.12) [2] and even more significantly in that it *permits virtually all worldly activities* except the

1. Sunday closing laws in general have been successfully attacked on constitutional grounds in several states. In light of these developments, this Court should hear and decided this appeal. See *infra* at p. 16-17.

2. The New Jersey Sunday Closing Law (L. 1959, c. 119) is not a "day of rest statute." *Two Guys from Harrison, Inc. v. Furman,* 32 N.J. 199, 160 A.2d 265 (1960). Also the New Jersey Sunday Closing Law (*N.J.S.A.* 2A:171-5.8, *et seq.*) repealed the prior Sunday Closing Law, which law proscribed virtually all worldly activity. (See *Vornado, Inc. v. Hyland,* 77 N.J. at 362, 363. See *Two Guys from Harrison, Inc. v. Furman, supra at* 225). The present New Jersey Sunday Closing Law is presently operative in only ten of the State's twenty-one counties. *Vornado Inc. v. Hyland, supra* at 351.

sale of five categories of *proscribed* items.[3] The other Sunday closing laws that this Court considered in *McGowan v. Maryland, supra, Gallagher v. Crown Kosher Super Market of Massachusetts, supra, Two Guys from Harrison-Allentown, Inc. v. McGinley, supra, and Braunfeld v. Brown, supra, proscribed all worldly activities* except for certain works of charity or necessity and amusement.[4]

Vornado, Inc., trading as "Two Guys" (hereinafter referred to as Two Guys), operates 27 full-line multi-department discount stores in the State of New Jersey. Twenty of these stores are located in counties in which the New Jersey Sunday Closing Law has been adopted by referendum (hereinafter "closed counties") and seven are located in open counties in which all manner of selling is permitted (T1.15-14, 22-3).[5] The individually named appellants are managers or assistant managers of Two Guys stores who were named as defendants in municipal prosecutions.

It was established at trial that prior to December 21, 1975, and on all Sundays subsequent thereto, Two Guys Stores were open for business but roped off certain departments and restricted shoppers from purchasing merchandise proscribed by the Sunday Closing Law. On Sunday, December 21, 1975, Two Guys management directed its employees to remove the ropes and offer for sale all merchandise, in order to test the constitutionality of the New Jersey Sunday Closing Law (T1.110-22 to T1.111-12).

3. The only other proscribed sales activity in New Jersey is the sale of new or used automobiles *N.J.S.A.* 2A:171-1.1. See *Gundaker Central Motors v. Gassert*, 23 N.J. 71, 127 A.2d 566 (1956) *appeal dism.* 354 U.S. 933, 77 S. Ct. 1397, 1 L.Ed.2d 1533 (1957).

4. See the trial court's opinion at 359-60 for a discussion of shopping as a recreational activity.

5. T. refers to the transcript of the trial below before the Superior Court of New Jersey.

Only the six municipalities, who are parties-defendants, responded by initiating prosecutions against Two Guys and/or the individual employees; the remaining fourteen municipalities located in closed counties did nothing.

On January 20, 1976, Two Guys instituted an action under *N.J.S.A.* 2A:16-50 *et seq.*, seeking a declaratory judgment that the New Jersey Sunday Closing Law was unconstitutional under the United States and New Jersey Constitutions, as well as other relief (Ja1).[6]

A temporary restraining order was issued by the Honorable Theodore W. Trautwein, Assignment Judge, Superior Court, on February 18, 1976, enjoining criminal prosecution, in the six defendant municipalities, of Two Guys and its employees, pending the trial and disposition of the case *sub judice* (Ja73). An order was entered on March 24, 1976, granting Menswear Retailers of New Jersey Inc., a trade association of men's retail clothing stores, (hereinafter referred to as Menswear Retailers), leave to intervene as an additional defendant. On July 12, 1976, a hearing was held before the Honorable Sylvia B. Pressler, Judge of the Superior Court, on the defendants', Town of Kearny (hereinafter referred to as Kearny) and New Jersey Attorney General Hyland's motions for summary judgment, which motions were denied (Ja104, Ja139).

On October 26, 1976, a nine-day trial commenced before Judge Pressler sitting without a jury.

On March 10, 1977, Judge Pressler rendered her decision declaring *N.J.S.A.* 2A:171-5.8 *et seq.* unconstitutionally arbitrary in its classification and permanently enjoining the pending municipal court prosecutions against Two Guys. This decision is reported at 148 N.J. Super. 343, 372 A.2d 667 (Law Div. 1977).

6. Ja refers to the joint appendix submitted by the parties to the New Jersey Supreme Court.

On March 11, 1977, City of Hackensack (hereinafter referred to as Hackensack) and Menswear Retailers applied for a stay of judgment to Judge Pressler (Ja143, Ja144). A hearing was held on the application by Judge Pressler and after hearing argument, the Court denied the defendants' application for a stay (Ja153) and entered a final judgment for appellants (Ja150).

Thereafter, Hackensack and Menswear Retailers applied to the Honorable Martin J. Kole, Judge of the Superior Court, Appellate Division, for a stay of all proceedings to enforce the judgment, holding the New Jersey Sunday Closing Law to be unconstitutional, pending appeal. Judge Kole granted the application of Hackensack and Menswear Retailers for a stay as set forth in an Order dated March 14, 1977 (Ja155). Two Guys then applied, in accordance with *R.* 2:9-8,[7] for emergent relief before the Honorable Morris Pashman, Justice of the New Jersey Supreme Court. Justice Pashman reversed and vacated the Order of Judge Kole, thereby reinstating the judgment entered by Judge Pressler declaring *N.J.S.A.* 2A:171-5.8 *et seq.*, unconstitutional. Justice Pashman also continued those portions of Judge Kole's Order which continued the permanent injunction against the defendants from prosecuting Two Guys under the pending municipal court complaints; and thereby vacated the restraints against Two Guys (Ja157).

The New Jersey Supreme Court *en banc* reversed Justice Pashman's Order and thereby preserved the New Jersey Sunday Closing Law pending the outcome of the appeal (Ja164).

Hackensack (Ja166), Menswear Retailers (Ja165) and Kearny (Ja167) filed Notices of Appeal and Two Guys

7. Rules Governing the Courts of the State of New Jersey.

filed a Notice of Cross Appeal with regard to the issues of selective enforcement and equal protection (Ja170). The other municipal defendants chose not to appeal. The Attorney General, while not filing a notice of appeal, submitted a brief and participated in the oral argument.

The New Jersey Supreme Court permitted numerous parties to file briefs as *amici curiae*. Among those who supported appellants' position that the New Jersey Sunday Closing Law was unconstitutional were:

> American Civil Liberties Union of New Jersey
> R. H. Macy t/a Bamberger's
> Hahne and Company
> Small Retailers for Sunday Opening
> The New Jersey Committee for Full Sunday Shopping, a group consisting of Supermarkets General Corporation (Pathmark Supermarkets and Rickel Home Centers) Channel Companies Inc. and K-Mart.

In addition, another group, the New Jersey Federation for Six Day Selling, filed an *amicus curiae* brief in support of the continuance of the New Jersey Sunday Closing Law.

The case was argued on April 11, 1978. On July 18, 1978, the New Jersey Supreme Court in a 5-2 decision in *Vornado, Inc., et al. v. Hyland, et al., supra,* held the New Jersey Sunday Closing Law to be Constitutional, thereby reversing the judgment of the trial court. The opinion of the New Jersey Supreme Court is reported at 77 N.J. 347, 390 A.2d 606 (1978). Two Guys applied to the New Jersey Supreme Court for a rehearing and for a stay of all municipal court prosecutions pending the rehearing. On September 5, 1978, the New Jersey Supreme Court denied Two Guys' application for a rehearing and denied the stay of the municipal court prosecutions.

On October 6, 1978, Vornado filed, with the Clerk of the New Jersey Supreme Court, its Notice of Appeal and Request to Certify and Transmit the Record. The Notice of Appeal and Request to Certify and Transmit the Record was also filed with the Clerk of the United States Supreme Court on October 30, 1978.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The New Jersey Sunday Closing Law creates a series of classifications bearing no rational relationship to the state interest of keeping the highways clear and unobstructed so that citizens may find relief from the stress of everyday pursuits.

In *Two Guys from Harrison, Inc. v. Furman, supra,* (hereinafter referred to as *Furman*), Chief Justice Weintraub held that the rational basis for the enactment of the Sunday Closing Law was to keep the highways clear and unobstructed so that citizens may find relief from the stress of everyday pursuits, 32 N.J. at 216, 228-29.

In *Furman*, the New Jersey Supreme Court found the New Jersey Sunday Closing Law to be facially Constitutional but remanded the case to the trial court to afford Two Guys the opportunity to sustain a heavy burden of proof and to demonstrate that the arbitrary nature of the classifications are not rationally related to the evils enunciated by the Court.[8] The *Furman* Court defined the evils the legislature sought to remedy as follows:

> . . . that the elimination of their sale on Sunday will remove the undue interference with the opportunity of the citizens for relief from the stress of everyday pursuits. 32 N.J. at 228-29.

In the case *sub judice*, Two Guys, by way of expert testimony, demonstrated that the prohibition against the sale of the five classes of proscribed items failed to advance, promote or serve the objectives set forth in *Furman*

8. This plenary hearing, wherein Two Guys might adduce proofs demonstrating the arbitrary nature of the five categories of proscribed items, was not held.

of preserving the secular virtues of Sunday as a day of rest, leisure, diversion and recreation. 32 N.J. at 216. In particular, Two Guys' proofs demonstrated that unrestricted Sunday shopping does not constitute an unreasonable interference with the public's right to pursue relief from everyday activities, 148 N.J. Super. at 353. The New Jersey Supreme Court, however, was not persuaded by the testimony and evidence and held that Two Guys did not demonstrate the level of proof necessary to establish the denial of equal protection of the law. *Vornado, Inc. v. Hyland, supra,* 77 N.J. at 351.

The testimony adduced at trial clearly established that the proscription of the sale of the five categories does not appreciably contribute to the freeing of the highways for recreational activities or enable citizens to find relief from the stress of everyday pursuits.

Dr. Yehudi Cohen, Professor of Anthropology at Rutgers University, testified that unrestricted Sunday shopping would improve the quality of family life in New Jersey (T5.134-24). He further stated that shopping itself is a recreational activity (T5.161-13 to 162-18). The New Jersey Supreme Court stated that Dr. Cohen's testimony was "virtually worthless for bias because of his avowed hostility to the policy of Sunday closing legislation, whatever the classification." *Vornado, Inc. v. Hyland, supra,* 77 N.J. at 359.

Likewise, the New Jersey Supreme Court placed little weight upon the testimony of Warren Travers (appellant's traffic expert) and Dean Boorman (Two Guys' professional planner) 77 N.J. at 361. The trial court properly relied in large part on this expert testimony and supporting proofs they submitted. 148 N.J. Super. at 351-360.

Mannie Rockoff, President of Menswear Retailers, testified that in his opinion Sunday openings would not be beneficial to his membership (T8.186-6 to 19); but he had no statistical information to support his thesis that Sunday opening would place his membership at an economic disadvantage (T8.192-10). Rockoff also testified that in open counties some member stores were open and others closed on Sunday. However, Rockoff produced no statistical information as to the economic effect on his member stores that remained closed while competing stores remained open (T8.190-12 to 191-4).[9]

Two Guys respectfully contends that the record in this case is barren of any proofs which demonstrate that full Sunday opening would be deleterious to the small merchant. In addition, the legislative intent and rational basis of the Sunday Closing Law, as announced by the *Furman* court, was to keep the highways free and clear for recreational traffic, not to protect the small businessman.

Rockoff testified that he believed that there was a spreading effect as to the amount of prospective business available and that Sunday opening would not increase his members' business (T8.193-8 to 13). Assuming *arguendo* that the "plight" of Menswear Retailers' members is relevant to this case, it is difficult to fathom what harm Sunday opening would cause Menswear Retailers since they would not suffer a reduction in business if Rockoff's spreading effect theory is valid. In any event, Two Guys submits that the rational basis of the New Jersey Sunday Closing Law does not involve the protection or destruction of *any* economic interest nor is that issue before this Court. See *Reingold v. Harper,* 6 N.J. 182, 192, 78 A.2d 54 (1951).

9. It is apparent that full Sunday opening would neither compel merchants to remain open on Sundays nor consumers to shop, but would merely afford them the freedom to do so if they so choose.

Based upon the foregoing, the New Jersey Sunday Closing Law is unconstitutional since it fails to meet the standards enumerated by the *Furman* court of promoting and enhancing the quality of the secular concept of Sunday sought to be protected by the Legislature. The classification of the five classes of proscribed items "is not reasonably related to the presumed purpose, and is, hence, unconstitutionally arbitrary." 148 N.J. Super. at 360.

II. The New Jersey Supreme Court erred by holding and concluding that the evidence adduced by Appellant Vornado, Inc., failed to demonstrate that *N.J.S.A.* 2A:171-5.8 *et seq.*, was incapable of being enforced except in a discriminatory and selective manner in contravention of the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Appellant respectfully submits that the evidence adduced at trial demonstrated that the New Jersey Sunday Closing Law is selectively enforced and is therefore invalid and unconstitutional.

On Sunday, December 21, 1975, the managers of Two Guys were directed by management to remove the ropes and offer for sale all merchandise in order to test the Constitutionality of the New Jersey Sunday Closing Law (T1.110-22 to 111-12). In fourteen of the twenty stores located in the closed counties, law enforcement officials took no action. The six municipalities, who are defendants in the instant case, initiated criminal prosecution in the local municipal courts. This uneven enforcement is underscored by the fact that in the six defendant municipalities, who instituted criminal prosecution, such action ranged from the *arrest* of the store manager (Hackensack and Kearny),

to one summons for *all* sales in the store (Garfield and North Bergen) to twenty-two summons in Vineland (one for each proscribed item purchased by police officers). See *State v. F. W. Woolworth Co.*, 154 N.J. Super. 550, 382 A.2d 51 (App. Div. 1977).

In the landmark case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220, 227 (1886), Mr. Justice Matthews wrote:

> ". . . Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by a public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution . . ."

It is clear that *Yick Wo* is not limited to discrimination based upon an ethnic or racial classification. The United States Supreme Court has stated that defendants in a Sunday closing law case who are seeking to enjoin criminal prosecutions on the basis of discriminatory enforcement could and must assert at trial the defense of selective prosecution. *Two Guys from Harrison-Allentown v. McGinley, supra.*

It is settled law that discriminatory enforcement is not limited to use as a shield to defend against individual lawsuits but can be utilized as a sword in an attack on the constitutionality of a statute. The elements which must be shown to effectively develop a discriminatory enforcement defense are that others in similar positions have not been prosecuted; and that there has been knowing discrimination based on an unjustified standard and further that it is impossible or at least improbable that the law can or

will be enforced in other than a discriminatory manner. See generally, *Schoch v. Tester*, 405 F.2d 852 (8th Cir. 1965); *Moss v. Hornig*, 314 F.2d 89, 93 (2d Cir. 1961); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973); see also, Comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws," 61 *Colum. L. Rev.* 1103 (1961), Comment, "The Ramifications of United States v. Falk on Equal Protection from Prosecution," 65 *J. Crim. L.C.* 62 (1974); Comment, "Defense Access to Evidence of Discriminatory Enforcement of Federal Penal Laws," 340 *Liv. St. L.J.* 942 (1973) and Note, "United States v. Falk, Developments in the Defense of Discriminatory Prosecution," 73 *Mich. L. Rev.* 1113 (1974).

The evidence adduced at trial indicated that law enforcement officers in New Jersey utilize the Sunday Closing Law to advance the anti-competitive motives of certain merchants opposed to Sunday openings, *cf*: *Ogler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L.Ed.2d 446 (1966).

There was sufficient evidence in the record below to demonstrate that Menswear Retailers has utilized the New Jersey Sunday Closing Law to further its own economic interests and had in fact initiated numerous prosecutions against Two Guys and other discount department stores who opened on Sunday (T4.67-10 to 23; T4.64-18 to 21).

Sidney Schlesinger, a leading member and past president of the Menswear Retailers, testified that his group has a policy of encouraging its members to prosecute establishments who contravene the Sunday Closing Law (T4.64-8). He also testified that his Association encouraged its members to observe Sunday openings and report any alleged violations to the authorities (T4.64-17 to 25). He also directed his own store's employees to observe any violations and in fact personally financed the purchases made by these employees (T4.68-1 to 19). He also testified

that the Association's counsel prosecuted several of these complaints on behalf of the State and that his group paid the attendant legal fees (T4.80-8 to 18).

The chief of police of defendant Lodi testified to, and counsel for the Menswear Retailers conceded that, Menswear Retailers filed complaints against a discount department store in Lodi and that his law firm prosecuted these complaints on behalf of the municipal prosecutor (T3.173-18 to 20). In addition, of the nine complaints in Lodi issued since the enactment of the New Jersey Sunday Closing Law, eight were against Two Guys or other discount department stores.

Likewise, the captain of the Vineland Police Department testified that in 1974 the only prosecutions in that municipality were initiated by complaints from local merchants to the police about the Sunday opening of a large discount department store (T3.107-13 to 24).

One issue in the case *sub judice* could well be summed up by the language of Justice Halpern of the Appellate Division of the New York Supreme Court, in the case of *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (1972), which involved prosecution under the New York Closing Law.

> "The claim of discriminatory enforcement does not go to the question of guilt or innocence of the defendant, which is within the province of the jury. The question is rather whether in a community in which there is a general disregard of a particular law with the acquiescence of the public authorities, the authorities should be allowed sporadically to select a single defendant or a single class of defendants for prosecution. The wrong sought to be prevented is a wrong by the public authorities. To allow such arbitrary and discriminatory enforcement of a gener-

> ally disregarded law is to place in the hands of police and the prosecution, a power of the type frequently involved in countries ruled by a dictator but wholly out of harmony with the principle of equal justice prevailing in democratic societies. The court is asked to stop such prosecutions at the threshold, not because the defendant is innocent but because the public authorities are guilty of conduct designed to discriminate unconstitutionally against the defendant."

Although it is arguable that only deliberate or intentional discrimination is in contravention of the Fourteenth Amendment, Two Guys respectfully contends that even under this standard neither malice nor subjective bad faith need be shown. If the existence of an impermissible standard for prosecution has been shown by objective criteria, there should be no need to prove that the standard was applied with malice. See *Edelman v. California*, 344 U.S. 357, 73 S. Ct. 293, 97 L.Ed. 387 (1953).

Courts in New Jersey's neighboring states of New York, Connecticut and Pennsylvania have recently held their Sunday closing laws to be unconstitutional. *People v. Abrahams*, 40 N.Y.2d 277, 386 N.Y.S.2d 661 (Ct. App. 1976) (New York); *The Kroger Co. v. O'Hara Township*, *supra* (Pennsylvania), and *State v. Anonymous I*, 33 Conn. Supp. 55, 364 A.2d 244 (C.P. 1976), *State v. Anonymous II*, 33 Conn. Supp. 141, 336 A.2d 200 (C.P. 1976), *Caldor Inc., et al. v. Bedding Barn, Inc., et al.*, Docket No. 162715, Superior Court Judicial District of New Haven at New Haven – Conn. Supp. –, – A.2d – (November 14, 1978).[10]

In addition, subsequent to this Court's decision in *McGowan v. Maryland, supra, Gallagher v. Crown Kosher*

10. The Connecticut trilogy (i.e.: *State v. Anonymous I, supra; State v. Anonymous II, supra* and *Caldor, Inc., et al. v. Bedding Barn, Inc. et al., supra*) held three successive attempts by the Connecticut legislature to impose Sunday sales restrictions unconstitutional.

Super Market of Massachusetts, supra, Two Guys from Harrison-Allentown, Inc. v. McGinley, supra, and *Braunfeld v. Brown, supra,* courts of the states of Georgia (*Rutledge v. Gaylord's*, 233 Ga. 694, 213 S.E.2d 626 (1975)); Oklahoma (*Spartan's Industries, Inc. v. Oklahoma City*, 498 P.2d 399 (1972)); Kentucky (*Ashland v. Heck's*, 407 S.W.2d 421 (1966)); Nebraska (*Skag-Way Department Stores, Inc. v. Omaha*, 179 Neb. 707, 140 N.W.2d 28 (1966)); Washington (*City of Spokane v. Valu-Mart Inc.*, 419 P.2d 993 (1966)) and Alabama (*Simonetti v. City of Birmingham*, 314 S.2d 83 (Ala. Ct. Crim. App. 1975), *cert. den.* 314 S.2d 99 (1975)) held their respective Sunday closing laws to be unconstitutional.

In light of the foregoing and also considering the changes in American Society[11] that have occurred since this Court last considered the constitutionality of Sunday closing laws, appellants respectfully submit that this Court should hear and decide the within appeal.

In *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 372 N.Y.S.2d (1975), the New York Court of Appeals faced the issue currently before this Court. In the majority opinion, Judge Jasen framed the question and the Court's conclusion as follows:

> "The principal issue, as we would frame it, is whether, with a history of disuse, and absent a policy of general enforcement, prosecution at the instance of an *interest group for its private purposes constitutes discrimination violative of the equal protection*

11. See the opinion of the trial court at 359-360. Since this Court decided *McGowan v. Maryland, supra, Gallagher v. Crown Kosher Super Market of Massachusets, supra, Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* and *Braunfeld v. Brown, supra, in* 1961, there have been widespread changes in the fabric of American society including the massive influx of women in the labor force as well as the decline of the central business district and the growth of the suburban shopping center as the new "downtown."

> *clauses of the Federal and State Constitutions.* We think so and accordingly would reverse [the appellant's convictions] on that ground alone. (emphasis added)

While recognizing and applying the two-fold standard derived from *Yick Wo, supra,* the New York Court of Appeals found that the conduct of State and local officials *in concert with private interest groups,* constituted intentional and purposeful discrimination in violation of both the State and Federal Constitutions.

In a subsequent New York case, *Twin Fair Distributors Corp. v. Cosgrove,* 85 Misc.2d 901, 380 N.Y.S.2d 933 (1976), a New York Supreme Court declared that State's Sunday closing law to be unconstitutional. While the decision rested largely on the irrationality of the exceptions to the general prohibition of Sunday sales, the Court recognized the role of discriminatory enforcement and the vagueness of the New York statute:

> ". . . Its classification, being a vestige of another age, devoid of rhyme, reason or symmetry, must necessarily make for selective and discriminatory enforcement which at best has been sporadic soon losing its momentum."

The Court noted that many of the prohibited items are easily available at State maintained vending machines along major highways (which is also the case in this jurisdiction)[12] and stated:

> ". . . If the State, through its agencies and contracts with others, can promote the sale of these commodities on a Sunday, it defies logic, why the State can prohibit others from doing the same thing through the normal channels of merchandising."

12. See Ja204 which indicates that instrumentalities of the State of New Jersey, including the Port Authority of New York and New Jersey and the New Jersey Turnpike Authority, are permitting sales of proscribed items on Sundays, in closed counties, at rest areas on the New Jersey Turnpike and at shops located in Newark International Airport. See also *State v. Anonymous I, supra.*

Furthermore, the Court gives another reason why laws which cannot be uniformly enforced should be invalidated.

> ". . . Experience has taught mankind that the retention of an unenforceable law which is universally violated, breeds contempt for the law generally . . ."

In *Playtogs Factory Outlet v. County of Orange,* 51 A.D.2d 772, 379 N.Y.S.2d 859 (1976), Justice Shapiro, in a concurring opinion, wrote:

> ". . . neither the agencies enforcing our criminal laws nor the courts should allow themselves to be thus used as cats' paws by those who seek to utilize the Sunday Closing Laws for their selfish competitive advantage. *When prosecutors follow a plug with respect to enforcement of the Sunday Closing Laws of initiating criminal prosecutions only on the complaints of private individuals, they become the tools of the private interest of the complainants and thus prostitute the State's law enforcement power to the service of selfish private goals"* (Emphasis added).

In *State v. Anonymous I, supra,* the Connecticut Sunday closing law was declared unconstitutional. This decision rested on the grounds of discriminatory enforcement and selective prosecution. Judge Quinn wrote at 246 as follows:

> "To permit the State of Connecticut through its official agencies to condone violations of the Sunday Blue Laws by permitting illegal sales without prosecution is certainly discriminatory in its effect . . ." 364 A.2d at 246.

Furthermore, the Court recognized that facilities leased from the State generally located near major highways sold prohibited items on Sunday and that:

> "This Court cannot understand any situation where the State of Connecticut may prosecute an individual proprietor on complaint of a competitor and *still permit the sale of goods* in violation of statute in its own facilities leased to private concerns . . ." 364 A.2d at 246.[13]

Another recent decision directly applicable to the case *sub judice* is *Simonetti v. City of Birmingham, supra.* There, the appellant established beyond a reasonable doubt that the City of Birmingham had engaged in a pattern of conscious and blatant non-enforcement of its blue laws.

Based on this record, the Alabama court concluded that plaintiff's constitutional rights under the Fourteenth Amendment had been "blatantly violated and that his arrest and conviction were brought about by invidious discrimination in the unequal enforcement of the Blue Laws of the City of Birmingham." *Simonetti, supra,* at 93.

In the case *sub judice,* several of the police chiefs testified that their departments spot check or inspect for Sunday closing law violations only at Two Guys or other similar discount department stores. The chief of police of Hackensack testified that the only store inspected for Sunday closing law violations is Two Guys (T2.19-20 to 25-10). The chief of police of Kearny testified that Two Guys is the only store in Kearny at which the police conduct regular interior patrol (T2.124-7 to 16) and that these patrols are conducted on an almost weekly basis (T2.125-12 to 28; see also Ja189).

13. See Footnote 12, *supra.*

The chief of police of Manalapan testified that the only summons and complaint ever issued in that municipality was to Two Guys (T5.15-2 to 13). This is especially relevant when contrasted to Chief Wallace's testimony regarding the absolute lack of enforcement at the Englishtown Auction [14] (T5.18-12-19).

In conclusion, appellants respectfully submit that this Court, after the passage of seventeen years, should reexamine its holdings in *McGowan v. Maryland, supra, Gallagher v. Crown Kosher Super Market of Massachusetts, supra, Two Guys from Harrison-Allentown, Inc., v. McGinley, supra, and Braunfeld v. Brown, supra.* In *McGowan,* the Maryland Sunday Closing Law proscribed all labor, business and other commercial activities on Sunday except for certain permitted items such as food, gasoline, drugs and other items. 6 L.Ed.2d 393, 397. The Massachusetts statute in *Gallagher v. Crown Kosher Super Market, supra,* also prohibits all worldly activity on Sunday except for works of charity and necessity. 6 L.Ed. 536, 538. Likewise, this Court's decisions in *McGinley, supra,* and *Braunfeld v. Brown, supra,* relate to the Pennsylvania Sunday closing law and are not controlling in the case *sub judice.*

The New Jersey Sunday Closing Law is unique in that it *permits* all manner of commercial activity except for the sale of "clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings or business or office appliances." *N.J.S.A.* 2A: 171-5.8. This Court should hear and decide whether this statute can pass constitutional muster.

14. The Englishtown Auction is an example of what is commonly called a "flea market" at which all manner of new and used merchandise is sold on a regular basis, fifty-two Sundays a year.

III. The New Jersey Supreme Court erred by holding and concluding that the classification of the items that could not be sold on Sunday was *not* unconstitutionally vague or ambiguous and in contravention of the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

This Court has repeatedly held that a penal statute must be sufficiently clear so that it will enable persons of ordinary intelligence to have fair notice as to what acts will subject them to punishment under the statute in question. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L.Ed. 322, 328 (1926); *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S. Ct. 329, 330, 96 L.Ed. 367, 371 (1951); *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 587, 76 L.Ed. 1167, 1182 (1932), *Grayned v. Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed.2d 222 (1972).

The New Jersey Courts, on two occasions, passed upon the issue of whether *N.J.S.A.* 2A:171-5.8 *et seq.*, was void for vagueness. *State v. Monteleone*, 36 N.J. 93, 175 A.2d 207 (1961); *State v. K-Mart*, 141 N.J. Super. 546, 359 A.2d 492 (App. Div. 1976) and concluded that the statute was not void for vagueness. In the case *sub judice*, the issue of vagueness was raised in Two Guys' verified complaint and the trial court, to a limited extent, permitted Two Guys to adduce certain narrow proofs with respect to the vagueness question demonstrating that even law enforcement officers cannot distinguish what items are proscribed and what items are permitted. Illustrative of this position is the fact that the chief of police of defendant City of Garfield testified that he had difficulty determining what items were proscribed and which were permitted (T2.87-21 to 88-9). He stated that he himself

was unclear as to whether a jogging suit was a sporting good (permitted) or clothing item (proscribed) (T2.89-20 to 90-4). Likewise, the acting police chief of the Township of Wayne stated that he was confused as to what items were proscribed and that this confusion was compounded by a list circulated by the Passaic County Prosecutor's Office (T2.171-14 to 172-1, Ja191).

In addition to the Passaic County Prosecutor's list, the proofs adduced at trial indicated that police departments had also been furnished with varying lists of what items are proscribed or permitted. Lists introduced at trial included those circulated by the Prosecutor of Bergen County (Ja181, 185), the Jersey City Police Department [15] (Ja181), Prosecutor of Monmouth County (Ja 203) and the New Jersey Attorney General (T3.127-15 to 18). Two Guys respectfully submits that these lists, all of which evidence various law enforcement agencies varying understandings of the statute, further confuse the issue and demonstrate the vagueness of the statute.

A cursory analysis of the statute, on its face, makes it clear that the terms used to define proscribed items fail to reflect any precise or even realistic meaning. For example, appliances are proscribed by the terms of the statute. Health and beauty aids are saleable. Is a hair curler an appliance or is it a beauty aid? The same is true of hair dryers, electric razors, etc. Is a lighted make-up mirror an appliance or a home furnishing (proscribed) or is it a health and beauty aid? (permitted).

Is a slenderizing exercising machine a health and beauty aid (permitted) or an appliance (proscribed) or is

15. This list incorrectly states that "only toys and perishables" may be sold on Sunday and demonstrates that the statute is not sufficiently clear so that not even law enforcement officials understand the distinction between proscribed and permitted items.

it sporting goods apparatus (permitted)? Is a car stereo unit or tape deck an automotive accessory (permitted) or a proscribed piece of audio equipment?

Clothing cannot be legally sold but sporting goods can be. Are sneakers clothing or sporting goods? Are sweatshirts, jogging suits, ski pants or tennis shorts clothing or sporting goods? [16]

This list could continue *ad nauseum* but this Court should consider whether the New Jersey Sunday Closing Law can pass Constitutional muster. Do persons of ordinary intelligence have fair notice as to the distinction between proscribed and permitted items? This Court should hear and decide whether the New Jersey Sunday Closing Law should be declared as void for vagueness.

16. The New Jersey Sunday Closing Law makes it a crime for a merchant to sell a warm sweater on a cold winter Sunday or to sell a mother diapers for her baby. It does, however, permit the sale of a blanket for a horse or clothing for a doll.

CONCLUSION

This appeal raises an important federal Constitutional question: the Constitutionality of a Sunday closing law in today's modern society. "While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926).

Appellants respectfully submit that this case raises a question of great public importance and that this Court should reconsider, especially in light of the unique nature of the New Jersey Sunday Closing Law, and the changes in American society which have occurred since 1961, its decisions in *McGowan v. Maryland, supra, Gallagher v. Crown Kosher Super Market of Massachusetts, supra, Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* and *Braunfeld v. Brown, supra.*

Respectfully submitted,

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APPENDIX A-1

VORNADO, INC., A CORPORATION OF THE STATE OF DELAWARE, T/A TWO GUYS; GERALD VITIELLO; JOSEPH HOPMAYER; STUART LEVINE; LOUIS MERCADO; THOMAS G. STRAMARA; AND ALAN LEDDEN, PLAINTIFFS, v. WILIAM F. HYLAND, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; CITY OF HACKENSACK; BOROUGH OF LODI; CITY OF GARFIELD; TOWNSHIP OF NORTH BERGEN; TOWN OF KEARNY; AND CITY OF VINELAND, DEFENDANTS.

Superior Court of New Jersey
Law Division

Decided March 10, 1977.

SYNOPSIS

Retailer brought suit to enjoin six pending municipal prosecutions for violation of the Sunday Closing Law. The Superior Court, Law Division, Pressler, J.S.C., held that the Sunday Closing Law, which barred retail sales on Sunday of clothing, lumber, furniture, furnishings and appliances, was unconstitutionally arbitrary in its classification.

Injunction issued.

1. Constitutional law §208(11)
Sunday §2
Sunday Closing Law, which barred retail sales on Sunday of clothing, lumber, furniture, furnishings and appliances, was unconstitutionally arbitrary in its classification. *N.J.S.A.* 2A:171-5.8 et seq.

2. Criminal law §13.1(2)

Sunday Closing Law's categorization of proscribed was not unconstitutionally vague. *N.J.S.A.* 2A:171-5.8 et seq.

3. Injunction §128(10)

In action to enjoin prosecutions under Sunday Closing Law, evidence failed to establish selective enforcement in violation of Fourteenth Amendment. *N.J.S.A.* 2A:171-5.8 et seq., *U.S.C.A. Const.* Amend. 14.

Mr. Frank J. Cuccio for plaintiffs (*Messrs. Jones, Cuccio & Klinger*, attorneys).

Mr. Paul Graham and *Ms. Ermine L. Conley* for defendant *William F. Hyland*, Attorney General of the State of New Jersey.

Mr. Seymour Chase for defendant City of Hackensack.

Mr. Edward R. Evans for defendant Borough of Lodi.

Mr. Anthony J. Sciuto for defendant City of Garfield.

Mr. Robert C. Auriemma for defendant Township of North Bergen.

Mr. Norman A. Doyle, Jr. for defendant Town of Kearny.

Mr. James R. Gruccio for defendant City of Vineland.

Mr. Edward G. Rosenblum for intervening defendant Mens Wear Retailers of New Jersey, Inc. (*Messrs. Rosenblum & Rosenblum*, attorneys).

PRESSLER, J. S. C. Plaintiff Vornado, Inc., trading as Two Guys, the corporate successor of Two Guys from Harrison, Inc., brought this suit renewing its earlier challenge to the constitutionality of the Sunday Closing Law, *N.J.S.A.* 2A:171-5.8 *et seq.* (*L.* 1959, c. 119).

[1] The genesis of the present action is the 1960 decision of the New Jersey Supreme Court in *Two Guys from Harrison, Inc. v. Furman*, 32 *N.J.* 199 (1960) (*Two Guys*), in which the court not only held that the then newly enacted Sunday Closing Law was facially constitutional, but also that it impliedly repealed prior Sunday-proscription legislation, thus constituting the sole general legislation addressed to prohibition of Sunday activities. Out of the whole panoply of possible commercial activity, that statutory prohibition proscribes only retail selling, and out of the whole panoply of possible commodities merchandised by retail selling, the statutory prohibition proscribes the sale of only five categories of times, to wit, clothing and apparel, building and lumber supply materials, furniture, home and office furnishings, and appliances for household, business or office use. The prohibition, moreover, applies only in those counties opting therefor by referendum, at latest count ten.[1] Thus 11 counties are virtually unrestricted in respect of the nature and breadth of the commercial activity which may be lawfully engaged in on Sunday, and the other ten are equally unrestricted except that goods within the five proscribed categories cannot be sold.

Despite its conclusion of facial validity, however, the court in *Two Guys* recognized the technical viability of plaintiff's constitutional attack based on the alleged arbitrariness and unreasonableness of the classification of proscribed goods. It thus held that plaintiff could not be denied an opportunity to try to sustain its heavy budren of proof of the arbitrariness of that classification in terms of

1. At the time *Two Guys* was decided, 12 counties had opted for Sunday closing, namely, Bergen, Passaic, Morris, Essex, Union, Hudson, Middlesex, Monmouth, Mercer, Gloucester, Cumberland and Somerset. Since then, both Gloucester and Mercer Counties have reopted to reject closing.

what the court had concluded the constitutionally unobjectionable secular purpose of the law to have been. Accordingly, the court's disposition of the controversy then before it was to affirm the trial judge's denial of plaintiff's motion for summary judgment seeking adjudication of the facial unconstitutionality of the Sunday Closing Law, but to reverse the judge's grant of defendant's motion for judgment on the pleadings seeking to have the constitutional attack dismissed out of hand as being wholly without merit. A remand was therefore ordered so that plaintiff might adduce at a plenary hearing factual proofs compellingly demonstrating the arbitrariness of the five-category classification. Despite the opportunity so afforded, plaintiff did not then proceed. Now, 16 years later, it has again challenged the Sunday Closing Law by the filing of a new complaint. Although the present challenge is based on other constitutional grounds as well, the trial herein constituted, at least in part, the remand ordered over a decade and half ago.

The factual and legal framework within which the trial was conducted requires some further explanation. Plaintiff owns and operates in this State 27 multi-line discount department stores engaged in the retail sale of a vast variety of goods. Nineteen of these stores are located in counties which have adopted the Sunday Closing Law (closed counties). The eight stores located in the other counties (open counties) are fully open for business seven days a week. The stores in the closed counties, with the exception of the Newark store, are also open on Sunday, selling, however, only those goods which are not within one of the proscribed categories. Departments in the stores which handle proscribed categories are physically roped off. Other retailers and, more particularly, multi-line discount operations similar to those of plaintiff's responded to the Sunday Closing Law in essentially the same manner.

Prior to the peak of the Christmas shopping season of 1975 plaintiff determined that despite its 15 years of voluntary compliance with the Sunday Closing Law, the time was now ripe for its judicial reconsideration. Also anxious to test the manner in which the law would be enforced when flagrantly violated, plaintiff's plan of attack was to violate the law first and litigate later. Accordingly, it directed its stores in the closed counties to open all departments on Sunday, December 21. That action resulted in prosecutions by six municipalities: Hackensack, Lodi and Garfield in Bergen County, Kearny and North Bergen in Hudson County, and Vineland in Cumberland County. The following Sunday, December 28, 1975, and thereafter until December 1976, the stores in the closed counties reverted to their customary partially-open pattern.

This complaint was filed in January 1976. The relief sought was the enjoining of the six pending municipal prosecutions on the ground of the Sunday Closing Law's alleged unconstitutionality. The managers of the stores who were named as defendants in the municipal prosecutions joined as nominal parties plaintiff. The six municipalities which had initiated the prosecutions were joined with the Attorney General as parties defendant. Menswear Retailers of New Jersey, Inc., a voluntary association of specialty retailers interested in maintaining Sunday closing, was permitted to intervene as a party defendant. The municipal prosecutions were temporarily restrained from proceeding pending the conclusion of the litigation.

In this posture a pretrial was conducted from which essentially two constitutional issues emerged. The first was framed in terms of the question left open by *Two Guys*, namely, whether, as a matter of fact, the statutory classification of proscribed goods is reasonably related to the secular policies sought to be advanced by Sunday closing. The

second issue was whether the statute is unconstitutional because it is not susceptible to even-handed, fair or consistent enforcement. A third legal issue, conceded by all parties not to reach sufficient constitutional dimension to be able to result in invalidation of the statute but only to effect the viability of the pending municipal prosecutions, was also raised, namely, whether or not those prosecutions were the result of an arbitrary and unreasonable selective enforcement policy of the prosecuting municipalities.

Plaintiff's proofs with respect to the classification issue must be viewed in the light of the constitutionally acceptable purpose and policy of the 1959 Sunday Closing Law as painstakingly analyzed and definitively articulated by *Two Guys*. As this court understands the holding in *Two Guys*, that articulation proceeded from the premise that the First Amendment requires the Sunday Closing Law to be based on presently relevant secular considerations appropriately within the scope of the police power rather than on the frankly-avowed, religiously-motivated underpinnings of the predecessor prohibitory legislation.[2] Delineation of the secular purpose of the Sunday Closing Law as found by the court in *Two Guys*, requires clear appreciation of what *Two Guys* specifically held the secular purpose *not* to be.

Preliminarily, it is clear that First Amendment establishment considerations would not have precluded the Legislature from compelling a day of rest for all citizens, qualified only by works of necessity and charity, since such legislation would have met the secular evil of "impairment of public health consequent upon uninterrupted labor." 32 *N.J.* at 218. While recognizing the constitutionality of such

2. And see, also, finding present secular content in Sunday Closing laws originally enacted to serve primarily religious purposes, *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed.2d 393 (1961); *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582, 81 S. Ct. 1135, L. Ed.2d 551 (1961).

a purpose, the court was nevertheless constrained to conclude that that was not the purpose of the Sunday Closing Law. It reached that conclusion inductively, reasoning that if the objective of the law were to prevent uninterrupted labor, then the arbitrariness of the five category proscription would be patent.[3] As the court reasoned, if uninterrupted labor were the "conception of the evil, we cannot fathom any reasonable basis for the differentiation in chapter 119 of the work area embraced in the sale of the items it proscribes from the work area it leaves untouched." 32 *N.J.* at 219. The court, therefore, following the constructional principle of sustaining the constitutionality of legislation wherever possible and having to reject, on equal protection grounds, an "uninterrupted labor" thesis, extracted from the Sunday Closing Law, based both on its express provisions and on its adjudicated status as an implied repealer of all Sunday legislation, an expression of a public policy intention to which the classification might presumably be rationally related.

That public policy was understood by the court to be the Legislature's quite proper concern with preserving the secular virtues of Sunday as a day for rest, leisure, diversion and recreation. As the court said:

> Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance, it is a secular holiday, a day for play, hobbies, recreation or relaxation. To still

3. Although surcease from uninterrupted labor was specifically rejected by the Supreme Court in *Two Guys* as the public policy intention of the Sunday Closing law, it has recently confirmed the constitutionality of that purpose where a classification problem was not raised. See *Schaad v. Ocean Grove Camp Meeting Ass'n.*, 72 N.J. 237 (1977).

> others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning. [32 N.J. at 216]

The evil then which the court perceived as underlying the legislative intention was "unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for the purpose." 32 *N.J.* at 228. Thus, it was not inactivity which the Sunday Closing Law was intended to enforce but rather it was intended to reasonably afford the opportunity for those kinds of activities which are usually foreclosed by the demands of the work week and, which provide, as stated by the court, "relief from everyday tensions" (32 *N.J.* at 228) and "relief from the stress of everyday pursuits" (32 N.J. at 229). If the ban on the sale of the five proscribed categories does not, therefore, as a matter of fact, advance, promote or serve these precise objectives, then, as a simple tautological proposition, it is not rationally related to its presumed legislative purpose and the challenged classification must fail.

Two Guys lends further guidance to that effort which must now be made. Thus, as the court instructed, "the legislative body may * * * classify operations upon such considerations as the amount of traffic, noise, or other bustle, and weigh those factors against, not necessity or charity, but rather relative utility or convenience to the public." 32 *N.J.* at 228. Thus, in rejecting the plaintiff's claim of facial invalidity of the 1959 enactment, the court regarded itself obliged to "assume, as the facts may reasonably be, that the Legislature found the [proscribed] items * * * are the ones which, above and beyond all others, are provocative of the problem; that the elimination

of their sale on Sunday will remove the undue interference with the opportunity of the citizens for relief from the stress of everyday pursuits." 32 *N.J.* 228-229. Finally, the court concluded, the demonstration of unconstitutional capriciousness cannot be made "merely by contrasting items which may and may not be sold. The relative utility of such items may be wholly unrelated to the degree of Sunday activity which their sale incites and to the relief which a ban upon them will accomplish." 32 *N.J.* at 229.

According to this court's synthesis of the *Two Guys* rationale, in order to adequately demonstrate the facts are not as the Supreme Court assumed they "may reasonably be" and hereby to now succeed where once they failed, plaintiff must show either that the classification is not at all related to the aim of affording the general public with relief from the stress of everyday pursuits or, if it bears some relation to that aim, its impact is not sufficiently significant in that regard to outweigh the public's inconvenience necessarily resultant from the ban imposed by the challenged legislation.

In deciding whether plaintiff's proofs have met either of these tests, tht court should first make clear those matters which it does not regard as relevant or appropriate to its determination. The court's own view as to the good sense and sound judgment of the Sunday Closing Law has, of course, absolutely no place in the decisional process. Nor is the scope of its power to determine the constitutional challenge based on arbitrariness here raised any broader than the single classification question expressly reserved by *Two Guys*. Nor may the court be directly influenced by either consideration of the self-interested profit motive of the plaintiff who challenges the law or by the small retailers' fears of the personal adverse effects of full Sunday opening. The sole concern of this court is whether the clas-

sification scheme underlying this piece of legislation has been demonstrated to have failed to legitimately advance the welfare of the general public in the manner in which our Supreme Court has indicated that it might. It is on those terms alone, and based on the factual findings herein set forth, that this court is constrained to conclude that plaintiff has met its burden of proof.

Plaintiff produced as fact witnesses 12 of its employees and 12 police chiefs or other high-ranking police officials of municipalities in various of the closed counties. The testimony of these witnesses was primarily directed to the enforcement issue. Testimony dealing directly with the classification problem was elicited essentially from plaintiff's three experts, Dr. Yehudi Cohen, an anthropologist, Warren Travers, a traffic engineer and consultant, and Dean Boorman, a land-use planner, and it is on that testimony that the success of the classification attack must rest.

Each of the three experts, dealing with the data appropriate to his particular discipline and interpreting and analyzing that data from the point of view of his particular professional concern and competence, arrived at essentially the same thesis, namely, that the ban on the sale of the five proscribed categories of goods both fails to advance the opportunity of the general public for recreation, diversion and leisure on Sunday, and, moreover, affirmatively impedes and interferes with that opportunity. The synthesized basis of that thesis is that unrestricted shopping, and particularly family shopping, is itself a frequently preferred leisure-time activity, and that that activity, when engaged in on Sunday by those who prefer to do so, will not appreciably impinge upon the opportunity of others to spend their Sunday in such other leisure-time pursuits as they may prefer. This court is satisfied that this thesis is conceptually within the scope of the reservation of *Two Guys*,

and hence, if it is found to have been adequately proved, the unconstitutional arbitrariness of the classification will have been demonstrated.

In assessing plaintiff's success in proving this thesis it must again be pointed out that *Two Guys* had assumed, in the absence of facts to the contrary, that the Legislature had determined that out of all other potential commercial activity, sale of the proscribed items would be particularly generative of circumstances which would interface with the public's opportunity to pursue recreational, leisure and diversionary activities. When that legislative determination was made, however, the predecessor Sunday legislation was still in effect. That legislation, essentially, proscribed the engaging in all "worldly employment or business" on Sunday, except for works of charity and necessity (*N.J.S.A.* 2A:171-1) and except for the sale of drugs, food and beverages (*N.J.S.A.* 2A:171-2).[4] Thus, when *N.J.S.A.* 2A:171-5.8 *et seq.* was adopted in 1959, there was then no existing evil of interference with the public's opportunity to pursue nonworkday activities on Sunday because virtually all workday activity was already banned. The legislative conception of the evil, therefore, could not have been based on any existing state of facts or accumulation of empirical data, but rather on the view, untested by experience, that the evil could be avoided by permitting all manner of commercial activity – for example, manufacturing, processing, service businesses, professional services, warehousing, farming, wholesale sales and indeed most retail sales– provided only that clothing, lumber, furniture, furnishings and appliances could not be sold at retail.

Two Guys, in its reluctance to hold this categorization facially arbitrary, suggested various factual hypotheses which might support its reasonable relationship to the legislative purpose. Chief among these was the potential

traffic consequence of unrestricted shopping, described by the court as commercial activities, adding "highway traffic to the discomfort of the Sunday driver and otherwise [impinging] upon a scene conducive to rest, diversion and recreation." 32 *N.J.* at 216. Accordingly, plaintiff's proofs were largely directed towards demonstrating that the traffic impact of Sunday shopping would not constitute an unreasonable interference with the public's opportunity to pursue relief from everyday pursuits. The court, in concluding that it was successful in this endeavor, relies largely upon the testimony of both Travers and Boorman.

Travers, a traffic consultant whose background, qualifications and credentials are impressive, was retained by plaintiff to assess, based on all available data, the probable traffic consequence of state-wide unrestricted Sunday shopping. Because unrestricted Sunday shopping is presently permitted in 11 of the 21 counties, his initial approach was to compare the ratio of highway use on weekdays as against Sundays in both open and closed counties. The purpose of the comparison was, obviously, to determine whether the opportunity for unrestricted retail shopping in the open counties had in fact added appreciably to Sunday traffic. In making this comparison he selected three pairs of general purpose state highways, Route 17 in Bergen County (closed) and Route 40 in Atlantic County (open); Route 35 in Monmouth County (closed) and Route 37 in Ocean County (open); and Route 22 in Somerset County (closed) and Routes 1 and 130 in Mercer County (open). Each of these was selected because of its similarity to the road with which it was paired, both

4. *N.J.S.A.* 2A:171-2 was amended in 1959 to add perishable horticultural and agricultural products as goods which might be legally sold on Sunday. That amendment was adopted after the enactment of *N.J.S.A.* 2A:171-5.8 *et seq.*, but before the *Two Guys* decision, which held that N.J.S.A. 171-5.8 had repealed *N.J.S.A.* 2A:171-2.

in the nature of its traffic patterns and its abutting uses. Additionally, Routes 17 to Catskill Mountains of New York State and Route 40 to the southern shore area of this State. Routes 35 and 37 were also selected because of their use for shore traffic. Routes 22 and 1 and 130 were chosen as representative of highways not significantly used for travel to and from major resort areas. These highways all were also used for this study because at critical points on all of them the State Department of Transportation maintains devices which count the vehicles actually traversing them. Using average weekday traffic as 100%, Travers then charted the percentage of Sunday use of each pair for the same recent two-year period.[5]

The result of this study is at first blush, surprising. With respect to the four recreational highways, each of the open-county roads had virtually the same ratio of summer Sunday traffic to summer weekday traffic as had the closed-county road with which it was paired. The percentage of use for the remainder of the year, Sunday as opposed to average weekday, was also substantially similar, with the exception of a more intense Sunday use of Route 35 in the spring than is made of Route 37. The charting of the nonrecreational routes showed that Route 22 in the closed county of Somerset was more heavily used proportionately on Sunday throughout the year than were the comparable Routes 1 and 130 in the open county of Mercer.

The inference raised by these data was further forcefully supported by Travers' study of the same roads in Mercer County both before and after its 1969 abandonment by referendum of Sunday closing. For this study

5. Relying on the most recent complete available data from the Department of Transportation, the Route 17/40 and Route 35/37 studies were based on average use in 1972 and 1973. The Route 22/1 and 130 study was based on average use in 1974 and 1975.

he used both Routes 1 and 130 and compared for each the percentage of Sunday use to average weekday use in 1967 and 1968 as opposed to 1970 and 1971. The percentage of Sunday use had actually declined after full Sunday opening was permitted.

Travers' explanation of these phenomena, supplemented by the testimony of Boorman, persuades the court that, as a general proposition and despite the possibility of some occasional exception, the Sunday proscription of the sale of the five proscribed categories does not appreciably contribute to freeing the highways for recreational and other leisure-time traffic. That explanation, accepted by the court, was based upon the following considerations, each of which is found to have been adequately supported by facts in evidence.

1. The extent of voluntary Sunday closing in open counties and the extent of the retail sale on Sunday of unproscribed goods in closed counties have tended to produce a homogenizing effect on general-purpose highway traffic throughout the State. That homogenizing effect is, in part, produced by the fact that sale of the unproscribed items as a group generates more trips than does sale of the proscribed items as a group. Typical drugstore purchases, it was Travers' opinion, generate the largest number of retail sale trips per square foot of floor space. Next come food sales. It was his further opinion that while clothing sales and building supply sales each generate approximately one-half the number of trips as food sales, each of the other three proscribed categories generates only one-twentieth or less of the number of trips. The relatively recent and widespread decision of the major food supermarket chains to remain open on Sunday in closed counties, has, because of the high volume of food-sale trips, further contributed to that homogenizing effect. Finally, the homogenizing effect is attributable to cross-county Sunday traffic by closed-county residents driving to open counties in order to shop unrestrictedly. The court further notes that that cross-county traffic is at least potentially added to by cross-Hudson traffic generated by the Sunday travel of closed-county residents to New York for shopping purposes.[6] This cross-county and inter-state traffic is further evidenced by the fact that according to the 1970 federal census, approximately 28% of New Jersey residents live in open counties, approximately 32% live in closed counties immediately adjacent to open counties, and some 41% live in closed counties immediately adjacent to New York State.

2. Shopping traffic does not by itself appreciably add to Sunday traffic because of the increasing multi-nature purpose of round-trip automobile travel. It was thus Travers' testimony that increasingly, except for work commutation and medical emergencies, an automobile trip from home to home will typically involve several stops and that the stops individually or collectively or both will combine such purposes as personal business, shopping and social and recreational transactions. Hence, a driver otherwise on the roads on Sunday for primarily nonshopping purposes is likely to be doing some shopping as well. Furthermore, Sunday shopping within closed counties for food, drugs and other unproscribed items tends to produce a greater proportion of single-purpose shopping trips than in open counties, where the Sunday shopping trip is more likely

6. The Sunday Closing Laws of New York State were declared unconstitutional on June 17, 1976 by *People v. Abrahams*, 40 *N.Y.*2d 277, 386 *N.Y.S.*2d 661, 353 *N.E.*2d 574 (Ct. App. 1976), with consequent widespread Sunday opening in that State. It should further be noted that the Connecticut Sunday Closing Law has also recently been held to be unconstitutional. *State v. Anonymous*, 33 *Conn. Sup.* 141, 366 A.2d 200 (C. P. 1976). Both the New York and the Connecticut decisions were based on the facial arbitrariness and irrationality of their respective Sunday Closing Law classifications, a *ratio decidendi* here foreclosed by *Two Guys*.

to be multi-purchase shopping. Thus, the effect of the Sunday proscription has been to reduce the categories of purchasable items without necessarily reducing the number of shopping trips.[7]

3. Shopping traffic, whether on Sunday or not, does not discernibly affect traffic on the State's system of limited access superhighways, which have been considerably improved and expanded since 1960. Those highways are not appreciably used by shoppers to reach areas of retail sales, have themselves no roadside users, and bear the major burden of intermediate and long-range automobile travel to, among other places, major resort areas. Furthermore, Sunday weekend traffic peaks on the limited access highway system in the evening, after most shopping would have been completed.

4. When Sunday shopping is available and unrestricted, the experience of major retail centers is that Sunday shopping generates approximately 40% of the traffic generated on Saturday. Average weekday shopping generates 60% of Saturday shopping traffic. A substantial proportion of this 40%, however, is attributable to shopping for only unproscribed items or for both proscribed and unproscribed items and is also likely to represent a combination of the shopping trip with other purposes.

5. While the emphasis of Travers' testimony was placed on highway traffic, it was his opinion, nevertheless, that local traffic would be virtually unimpacted by Sunday shopping for essentially the same reasons.

Plaintiff's experts addressed themselves not only to automobile traffic but also to the general aura of "hustle and

7. The experts further suggested that the increased number of trips and the cross-county travel generated by the present ban involve excess fuel consumption, not an insignificant consideration.

bustle" referred to in *Two Guys* as potentially detracting from the enjoyment of Sunday. It was their theory that the "hustle and bustle" attributable to the sale of proscribed categories over and above that attributable to the sale of permitted categories is generally confined to the immediate areas where such activities are carried on, namely, highway shopping centers and central business districts. They pointed out that these commercial concentrations are usually geographically separated from residential neighborhoods and, therefore, do not substantially affect the peace and quiet of such neighborhoods.

In terms of the potentially negative consequences of unrestricted Sunday shopping, it has already been indicated that the purpose of providing relief from uninterrupted labor was rejected by *Two Guys* as the underlying policy of the Sunday Closing Law.[8] Nevertheless, in that context, it is significant to note, as testified to by Boorman based on his analysis of census date, that as of 1972, only 13.7% of employed New Jersey residents were employed in retail sales and only 3.6% employed in the retail sale of proscribed items. Adjusting this figure to reflect retail sales in open counties, it was his conclusion that only 2.9% of New Jersey's total work force is presently affected by the ban.

Plaintiff's thesis was based, as noted, not only on the contention that the elimination of the present limited shopping ban would not unreasonably interfere with the diversionary pursuits of those who do not wish to shop on Sunday but also on the contention that the present ban

8. It would be naive in the extreme if the court did not recognize that as a result of the labor union movement, as well as passage of statutes directly aimed at controlling the work week, the vast majority of the population does not work on either Saturday or Sunday; that those who do have two other days a week off, and that in terms of preventing uninterrupted labor, the Sunday blue laws, all deriving from religious consideration prevailing in the American Colonies of the 17th and 18th Centuries, are an evident anachronism.

interferes unreasonably with those who do wish to shop on Sunday. The basis of that contention is twofold: first, that the shopping expedition is itself a form of diversion and recreation, and second, that most people ordinarily have the entire weekend, both Saturday and Sunday, free from employment obligations, and their inability to shop on Sunday unreasonably impinges on their opportunity to order their weekends flexibly, efficiently, and in a manner which maximizes their enjoyment of their free time.

The testimony of the experts that shopping is recreational in itself for many people is virtually a matter of common understanding. Indeed, that it is an activity generally associated with the use of leisure time is the evident explanation for the resistance by the resort areas of the State to Sunday closing during the legislative activity on the subject in the 1950s. See *Two Guys*, 32 *N.J.* at 210. The recreational values of shopping are further demonstrated by the proliferation of flea markets which enjoy regular and substantial patronage. Moreover, the regional and some of the community shopping centers are planned to include such direct recreational facilities as movies, theatres, skating rinks, bowling alleys, restaurants, galleries and auditoriums, which, together with the customary amenities of the mall areas themselves, provide opportunities for both direct and indirect recreation in combination with the shopping trip.[9] As Dr. Cohen further pointed out, in modern American life diversion and recreation must be defined to include all activities in which the members of a nuclear family can engage in together in their free time. Shopping on Sunday when all the family members

9. This replacement by the full service modern shopping mall of the urban central business district and the consequent adverse effect thereof on the continued viability of inner city commercial areas are independent phenomena not only unrelated to partial Sunday closing but also expressely rejected by *Two Guys* as having motivated enactment of the Sunday Closing law. 32 N.J. at 227.

are free is one of these. Such shopping further enhances the quality of family life by providing family members with an opportunity to participate together in making major purchases and to share generally in an experience of mutual interest and concern. Of further significance in terms of family life is the unreasonable inconvenience which the present proscription imposes upon the increasingly large numbers of married women and particularly married mothers in the general labor force who, of necessity, must compress the family's shopping needs into an already over-demanding Saturday schedule. Unrestricted Sunday shopping would also have the positive effect of relieving the stress, tension and traffic congestion which presently result from the intensity of Saturday as the primary shopping day. Moreover, the availability of Sunday as an unrestricted shopping day would tend to spread diversionary activities over the entire weekend, thus relieving structured recreational facilities from the intensity of their present Sunday use.

Defendants did not produce any expert witnesses of their own to refute any of these theses or the facts on which they were based, and the court is satisfied that they were not substantially refuted by defendants' cross-examination of plaintiff's experts.

In view of all of the foregoing, the court is convinced that plaintiff has proved that the classification here attacked fails to promote and enhance the quality of the secular concept of Sunday sought to be protected by the Legislature. The classification is, therefore, held to be not reasonably related to the presumed purpose of the statute and is, hence, unconstitutionally arbitrary. The Sunday Closing Law, as set forth in *N.J.S.A.* 2A:171-5.8 *et seq.*, cannot stand.

[2] The holding therein renders moot plaintiff's challenge both to the Sunday Closing Law itself and to the six municipal prosecutions here involved based on the alleged enforcement problems. The court is, however, satisfied that these challenges are without merit. The first of these is predicated on the assertion that the categorization of proscribed goods is so vague and ambiguous that even law enforcement officers do not clearly understand what may be sold and what may not be sold. Not only is that argument foreclosed as a matter of law, *State v. Montelleone*, 36 N.J. 93 (1961); *State v. K-Mart*, 141 N.J. Super. 546 (App. Div. 1976), but further, this court finds it to be unsupported by the facts. Plaintiff relies on some prosecutorial disagreement, expressed in memoranda circulated among the local police departments by several of the county prosecutors of closed counties, as to the Sunday saleability of specific items. It also suggests that the relatively small number of prosecutions throughout the State since enactment of the Sunday Closing Law evidences an inability of law enforcement authorities to distinguish between proscribed and unproscribed goods. It points as well to the now familiar litany of anomalies between goods which may be sold and those which may not. See, *e.g.*, the dissenting opinion of Justice Francis in *Two Guys*, 32 N.J. at 237. The court, however, is nevertheless satisfied that, except for the relatively small number of marginal cases falling within the inevitable fringe area, there is in fact a clear general understanding of the scope of the proscription by both law enforcement officials and by retailers, and that the pucity of actual prosecutions for violations of the law is primarily attributable to the consistently high level of voluntary compliance therewith by the retailers. The classification may be unconstitutionally arbitary in terms of the legislative purpose. It is not, however, either unconstitutionally vague or inherently irrational.

[3] In support of its claim of selective enforcement, which plaintiff contends vitiates the pending prosecutions on Fourteenth Amendment illegal discrimination grounds, it relies primarily on *People v. Acme Markets, Inc.*, 37 *N.Y.* 2d 326, 372 *N.Y.S.*2d 590, 334 *N.E.*2d 555 (Ct. App. 1975). There the court dismissed pending prosecutions brought by Erie County against various food supermarkets for Sunday Closing Law violations. The dismissal was based on the finding that the law, at least in that area of the State, had been for some time massively and flagrantly violated with the knowledge and acquiescence of law enforcement agencies, and further, that the prosecutions in question had been instigated by a labor union which objected to Sunday sales because they had resulted in the hiring of part-time non-union labor. This combination of facts constrained the court to include that the prosecutions were indeed the product of invidious discriminatory enforcement. Plaintiff sought to bring itself within the operative factual complex of *Acme Markets* by attempting to demonstrate widespread violation of the law in the closed counties and prosecution only at the behest of the Menswear Retailers Association, whose members do admittedly occasionally seek out and report violations to the local police authorities. The proofs here, however, unlike those in *Acme Markets*, do not indicate a total surrender of enforcement to a private interest group. Most of the police departments in those municipalities in closed counties in which large retailers remain partially open on Sunday do, in fact, spotcheck these operations regularly by the use of plain-clothes detectives. More significantly, there was insufficient proof here of massive and widespread violation. As already indicated, there is massive and widespread compliance. The court does not consider the still relatively isolated Sunday flea market operation or the occasional

sale by food and drug chains of fringe items as amounting to anything like an effective abandonment of the law by either police authorities or retailers.

For the reasons herein set forth, plaintiff is entitled to the relief it seeks. The pending prosecutions are permanently enjoined because *N.J.S.A.* 2A:17-5.8 *et seq.* is unconstitutionally arbitrary in its classification.

APPENDIX A-2

For reversal and remandent—Chief Justice Hughes, Justices Sullivan, Pashman, Clifford, Schreiber and Handler and Judge Conford—7.

For affirmance—None.

VORNADO, INC., a corporation of the State of Delaware, t/a Two Guys, *et al.*, Plaintiff-Respondent-Cross-Appellant v. WILLIAM F. HYLAND, Attorney General of the State of New Jersey, Defendant-Respondent, and CITY OF HACKENSACK, TOWN OF KEARNY and MENSWEAR RETAILERS OF NEW JERSEY, INC., Defendants-Appellants-Cross-Respondents, and BOROUGH OF LODI, CITY OF GARFIELD, TOWNSHIP OF NORTH BERGEN and CITY OF VINELAND, Defendants.

Argued April 11, 1978—Decided July 18, 1978

SYNOPSIS

Suit was brought to enjoin pending prosecutions for violation of Sunday Closing Law. The Superior Court, Law Division, 148 *N.J. Super.* 343, 372 A.2d 667, issued an injunction, and appeal was taken. Pending appeal in the Superior Court, Appellate Division, the Supreme Court granted direct certification. The Supreme Court, Conford, P.J.A.D. (temporarily assigned), held that: (1) Sunday Closing Law which is effective only in counties choosing to adopt it by referendum and which prohibits Sunday sale of clothing and wearing apparel, building and lumber supply materials, furniture, home, business or office furnishings and household, business or office supplies is not constitutional as violative of equal protection and (2) categorization of goods saleable and nonsaleable under statute is not unconstitutionally vague and ambiguous.

Reversed and remanded with directions.

Sullivan, J., filed a concurring opinion in which Clifford, J., joined.

Pashman, J., filed a dissenting opinion.

Handler, J., filed a dissenting opinion in which Pashman, J., joined.

1. Constitutional law §70.3(3)

Courts have paramount obligation not to invalidate legislation merely because courts disapprove its public policy.

2. Constitutional law §70.1(7)

If classification in Sunday Closing Law which barred retail sales on Sunday of clothing, lumber, furniture, furnishings and appliances had some relation to legislative objective of relief from interference with Sunday rest and relaxation, it is immune from invalidation through judicial admeasurement of a supposed prepondeant inconvenience to would-be Sunday shoppers. *N.J.S.A.* 2A:171-5.8 et seq.

3. Constitutional law §70.1(6)

Weighing of relative benefits and detriments in police power regulation is for Legislature exclusively.

4. Constitutional law §239(2)

Sunday §2

Sunday Closing Law which is effective only in counties choosing to adopt it by referendum and which prohibits Sunday sale of clothing or wearing apparel, building and lumber supply materials, furniture, home, business or office furnishings and household, business or office appliances is not unconstitutional as violative of equal protection. *N.J.S.A.* 2A:171-5.8 et seq.

5. Statutes §47

Sunday §2

Categorization of goods saleable and nonsaleable under Sunday Closing Law is not unconstitutionally vague and ambiguous. *N.J.S.A.* 2A:171-5.8 et seq.

6. Sunday §2

Sunday Closing Law is not invalid as incapable of uniform enforcement. *N.J.S.A.* 2A:171-5.8 et seq.

Mr. Edward G. Rosenblum argued the cause for appellant Menswear Retailers of New Jersey, Inc. (*Messrs. Rosenblum and Rosenblum, attorneys*).

Mr. Norman A. Doyle, Jr. argued the cause for appellant Town of Kearny.

Mr. Seymour Chase argued the cause for appellant City of Hackensack.

Mr. Frank J. Cuccio and *Mr. Jack Dashosh* argued the cause for respondent-cross-appellant (*Messrs. Jones, Cuccio* and *Klinger* and *Jack Dashosh*, attorneys; *Gary S. Redish on the brief*).

Mrs. Erminie L. Conley, Deputy Attorney General, argued the cause for respondent (*Mr. John J. Degnan*, Attorney General of New Jersey, attorney; *Mr. Stephen Skillman*, Assistant Attorney General, of counsel; *Mrs. Conley*, on the brief).

Mr. Robert A. Vort submitted a brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey.

Messrs. Robinson, Waynes and Greenberg submitted a brief on behalf of *amicus curiae* Hahne and Company (*Mr. Robert A. Wayne*, of counsel; *Mr. Edward F. Lamb*, on the brief).

Messrs. Ravin, Davis and Sweet submitted a brief on behalf of *amicus curiae* Small Retailers for Sunday Opening (*Mr. Alan E. Davis* and *Mrs. Gerard C. Sims, Jr.*, of counsel and on the brief).

Messrs. Clapp and Eisenberg submitted a brief on behalf of *amicus curiae* B. Altman and Company, et al. (*Mr. Stuart L. Pachman*, on the brief).

Messrs. Kimmelman, Wolff and Samson submitted a brief on behalf of *amicus curiae* The New Jersey Committee for Full Sunday Shopping (*Mr. Irwin I. Kimmelman*, of counsel; *Mr. Armen Shahinian*, on the brief).

Messrs. Lum, Biunno and Tompkins submitted a brief on behalf of *amicus curiae* R. H. Macy and Company, Inc., et al.

The opinion of the court was delivered by

Conford, P.J.A.D. (temporarily assigned). Pending appeal in the Superior Court, Appellate Division, this Court granted direct certification to review a holding by the Superior Court, Law Division, 148 *N.J. Super.* 343; that the classification of merchandise forbidden to be sold on Sunday under and pursuant to the Sunday Closing Law, *N.J.S.A.* 2A:171-5.8 *et seq.* (L. 1959, c. 119), in counties opting for the statute by referendum, is "not reasonably related to the presumed purpose of the statute and is, hence, unconstitutionally arbitrary." 148 *N.J. Super.* at 360. The assumption must be that the constitutional defect discerned was the denial of equal protection of the laws, as the ruling purports to decide the question left open for factual exploration in our decision in *Two Guys from Harrison, Inc. v. Furman*, 32 *N.J.* 199 (1960) ("Two Guys," hereinafter). That issue was denial of equal protection. See *id.* at 211. 222.

The Sunday Closing Law was held in Two Guys to supersede and replace the 1951 revision of earlier Sunday closing legislation which comprehesively prohibited all Sunday employment or business except for works of necessity or charity. *N.J.S.A.* 2A:171-1 *et seq.* The 1951 revision contained only a $1 penalty for any violation. The present statute, adopted in 1959, provided that it should be effective only in counties which chose to adopt it by referendum, and prohibited Sunday sale of only (1) clothing or wearing apparel; (2) building and lumber supply materials; (3) furniture; (4) home, business or office furnishings; and (5) household, business or office appliances. Substantial penalties were provided for violation. The law is presently effective in ten of the twenty-one counties.

Two Guys sustained the Sunday Closing Law against attack on grounds of violation of the constitutional ban against union of State and Church in both the federal and state constitutions. 32 *N.J.* at 226. It found adequate secular legislative objects for Sunday closing legislation in (1) relief from uninterrupted labor for seven days a week; and (2) eliminating or reducing interference with the ambiance of Sunday as a generally accepted common day for rest, relaxation, relief from everyday tensions and recreation (hereinafter, the "rest and relaxation object"). 32 N.J. at 215-216. However, the first basis was determined not to be rationally related to the classification of the Sunday Closing Law as it was relevant to all workers, not peculiarly those engaged in selling the five categories of proscribed merchandise. *Id. at* 218-219. The Court went on to hold the law facially valid from the standpoint of the rest and relaxation objective, but reversed a summary judgment dismissing the constitutional attack as related to that statutory purpose, ruling that while it might indeed "be difficult for plaintiffs to maintain their heavy

burden of proof * * * they may not be denied an opportunity to try." *Id.* at 230.

The plaintiffs in the present case, who comprise the corporate successor of the plaintiff in the *Two Guys* case and certain of its employees, purport now to have adduced the proof requisite to establish the denial of equal protection not found as a matter of law in *Two Guys*. The trial court concluded that they were successful in that endeavor. We granted certification while the matter was pending unheard in the Appellate Division, 75 *N.J.* 584 (1977). We are constrained to disagree, and we reverse. We find trial error in two broad resepcts: (a) with respect to the court's conception of the nature of the judicial responsibility *vis a vis* that of the Legislature in this area; and (b) with regard to the adequacy of the proofs submitted by plaintiffs to negate all reasonably conceivable purposes or objects for the statutory classification.

We find no merit in the cross-appeal of plaintiffs addressed to alleged vagueness of the statute and to the asserted selective and discriminatory enforcement thereof. We agree with the trial court's rejection of those contentions. See 148 *N.J. Super.* at 361-362.

Before examining the evidence in the case before us and the rationale of the trial court in holding it sufficient to invalidate the Sunday Closing Law, it is well to be reminded of certain cardinal principles required to be followed by the judiciary in passing upon the question as to whether a statutory classification of subject matter is invalid as a denial of the equal protection of the laws. Apart from the general presumption of constitutionality which attends every statute, the heart of the applicable criterion was expressed in *WHYY Inc. v. Glassboro*, 50 *N.J.* 6, 13 (1967),

rev'd 363 *U.S.* 117, 89 *S. Ct.* 286, 21 *L.Ed.*2d 242 (1968),[1] as follows:

> The Legislature is presumed to have a valid classification in mind. Distinctions will be presumed to rest upon a rational basis if there be *any conceivable state of facts* which would afford reasonable support for them. (emphasis added).

The formidable nature of the burden resting on those who would establish the invalidity of a statutory classification in an equal protection context is well delineated in *N.J. Restaurant Ass'n v. Holderman*, 24 *N.J.* 295, 300 (157), as quoted in *Two Guys* (32 *N.J.* at 218), as follows:

> The burden of demonstrating that a statute contravenes the equal protection clause is extremely formidable, as is attested by the long trail of failure. In addition to the strong presumption of constitutionality with which all organic challenges are approached, one who assails a statute on this ground must contend with principles of unusual elasticity. It is easily stated that the classification (1) must not be palpably arbitrary or capricious and (2) must have a rational basis in relation to the specific objective of the legislation. But the second proposition is qualified by limitations which compound the difficulties of one who assails the legislative decision. Thus it is not enough to demonstrate that the legislative objective might be more fully achieved by another, more expansive classification, for the Legislature may recognize degrees of harm and hit the evil where it is most felt. [Citations omitted.] The Legislature may thus limit its

1. The reversal by the United States Supreme Court was not on any disagreement with the standard but on the State Supreme Court's application of the standard.

action upon a decision to proceed cautiously, step by step, or because of practical exigencies, including administrative convenience and expense, * * * or because of "some substantial consideration of public policy or convenience or the service of the general welfare." *De Monaco v. Renton*, 18 *N.J.* 352, 360 (1955). Hence it may "stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact." *Dominion Hotel, Inc. v. State of Arizona, supra* (249 *U.S.* [265] at page 268, 39 *S. Ct.* [273] at page [63 *L.Ed.* 597]). * * *"

Chief Justice Weintraub went on in *Two Guys, supra,* to say (32 *N.J.* at 219):

As stated in *Holderman*, a discrimination which in the nature of the subject matter would otherwise be invidious may be relieved of that character if, generally speaking, a rational basis may be found for it in terms of degrees of evil or in the practical problems inherent in the process of legislating or in enforcement.

* * *

The reason why a Legislature may strike at an evil where it finds it without first surveying the entire scene in which it may exist even in equal degree is an inescapable concession to the practicalities of a complex social and economic order. The legislative process would be hamstrung if the Legislature had to explore every nook and corner before it acted.

Subsequent to the decision in *Two Guys* the United States Supreme Court sustained the validity of Sunday closing statutes in Maryland and Pennsylvania, both containing numerous and varied exemptions, against attack

on various grounds including denial of equal protection. *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961); *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582, 81 S. Ct. 1135, 6 L.Ed.2d 551 (1961). In *McGowan* the Court said:

* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. 366 U.S. at 425-426, 81 S. Ct. at 1105.

The Court held that the Legislature "could reasonably find" a rational basis for each of the exemptions, whether in fact, local tradition or custom. *Id.* at 426-428, 81 S. Ct. 1101.

In his classic concurring opinion in the *McGowan* case, Justice Frankfurter said:

* * *The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstra-

tion that in the actual state of facts which surround its operation, its classifications lack rationality. 366 U.S. at 459, 535, 81 S. Ct. at 1153, 1194.

[1] Courts have a paramount obligation not to invalidate legislation merely because they disapprove its public policy. To yield to the impulse to do so is to subvert the sensitive interrelationship between the three branches of government which is at the heart of our form of democracy. In this regard, one cannot overemphasize the admonition of the Chief Justice in *Two Guys*, when he said:

> It is worth repeating that the Judiciary is not concerned with the good sense of a statute. Policy matters are the exclusive responsibility of the legislative branch of government. A judge, as a private citizen, may express his opinion at the polls, as every member of this court had the opportunity to do when chapter 119 was on the ballot. But the issue now before us is wholly one of the power of the Legislature to act, and upon that inquiry a judge would usurp authority if his personal view of policy intruded upon his deliberations. 32 N.J. at 229.

So much established introductorily, we turn to the matter of the rationality of the classification of the Sunday Closing Law. The first relevant inquiry is as to the object or objects of the law. As noted above, *Two Guys* declared the pertinent object to be that of reducing or eliminating interference with Sunday as a common day of rest and relaxation. The trial court considered the constitutional issue as merely whether unrestricted Sunday shopping by those who wish to do so "will * * * *appreciably* impinge upon the opportunity of others to spend their Sunday in such other [than shopping] leisure-time pursuits as they may prefer" (emphasis added). 148 N.J. Super. at 352.

In view of this unduly narrow perspective it will be well to review the full spectrum of what Sunday means to the generality of the populace, as conceived in *Two Guys* to have been properly within the legislative contemplation in proscribing Sunday activity.

> * * * The fact is that Sunday has acquired a special character differentiating it from the other days of the week and this without reference to religious connotation. Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance, it is a secular holiday, a day for play, hobbies, recreation or relaxation. To still others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning.
>
> Thus the public health and welfare are implicated when the hustle and bustle mount and intrude unreasonably upon opportunities for rest, leisure and diversion. The inroad may be in terms of direct interference as, for example, when commercial activities add to highway traffic to the discomfort of the Sunday driver or otherwise impinge upon a scene conducive to rest, diversion and recreation. The inroad may be indirect but equally real as when those who want to be free on Sunday find the economic aims of their employer compel them to work to hold their jobs, or when the economic impact upon employers requires them and their staffs to remain at the grindstone. 32 N.J. at 215-216.

Thus, applying the teaching of the equal protection cases cited above, if there is any reasonably conceivable basis upon which the Legislature could have deemed the Sunday sale of the five categories of articles to have interfered to some degree with the public enjoyment of Sunday in one or more of the aspects of rest and relaxation described in the foregoing excerpt from *Two Guys*, the Court must sustain the law. It is the legislative function, not that of the court, to weigh the anticipated benefits to the public against the detriments to would-be Sunday shoppers and merchants. Only if the anticipated benefits could be affirmatively established to be so illusory as to stamp the legislative classification as arbitrary or capricious would a court be justified in striking it as lacking in equal protection or as denying due process.

Before subjecting the invalidating rationale of the trial court to analysis, certain facts which are obvious in relation to possible legislative motivations and implicit justificatory considerations for the classification of economic activities proscribed on Sunday by the current statute should be noted. Practically all manufacturing, processing and wholesaling activity, as well as the bulk of the service industries, ceases on Sunday. While this may have originated in religious belief, in modern times it has become largely a custom rooted in social and economic considerations.[2] Such closure extends to small as well as large businesses. There was therefore no pressing need to include in the Sunday Closing Law when enacted in 1959 prohibitions extending to such activities. As of 1959 and since, as we may assume the Legislature was aware, there was also large-scale voluntary closure of retail sales activity on Sunday. Notable exceptions thereto are some food establishments, restaurants, gasoline stations and drug stores. A rational basis for exempting these from Sunday closure on grounds of necessity or relationship to Sunday as a day of relaxation is obvious. Considerations of relevance to convenience for Sunday recreation seekers would also rationally justify excluding from the ban the wide variety of goods and articles sold for use in recreational activities. See *McGowan v. Maryland*, *supra*, 366 U.S. at 427-428, 81 S. Ct. 1101.

2. The trial court opinion notes that industry today broadly observes a Saturday-Sunday holiday, partly the result of the labor union movement. 148 N.J. Super. at 358, n. 8.

As to the limitation in the 1959 statute of furniture, furnishings, building materials, clothing and appliances as the only types of items forbidden to be sold on Sunday, we note that *Two Guys* recognized that there was a major eruption of retail activity on the highways during the 1950's, 32 N.J. at 209, see also *McGowan v. Maryland*, *supra*, 366 U.S. at 541, 81 S. Ct. 1101 (concurring opinion of Frankfurter, J.) as to similar phenomena in Pennsylvania, and it is clear to us that the Legislature could reasonably have felt that the kinds of merchandise mentioned were typically those whose Sunday sale was beginning to constitute a substantial threat to the Sunday rest and relaxation of the population at large. The Legislature was, of course, constitutionally free to address and deal with this particular impediment to Sunday rest and relaxation without extending a prohibition to every other area of possible need. *Two Guys*, 32 N.J. at 218-219.

The trial court in the instant case did not undertake to establish that the classification in the Sunday Closing Law, in the sense of contrast between articles permitted and articles forbidden to be sold, was devoid of any rational relationship to its validated purposes on any conceivable basis the Legislature might have entertained therefor. It did not even address that proposition. Rather, the court proceeded on the bald assumption that if there were any

such rational basis for the classification the court could invalidate the law if its purported salutary effect was outweighed by the resulting inconvenience to Sunday shoppers. Thus the court said:

> [P]laintiff must show either that the classification is not at all related to the aim of affording the general public with relief from the stress of everyday pursuits or, if it bears some relation to that aim, its impact is not sufficiently significant in that regard to outweigh the public's inconvenience necessarily resultant from the ban imposed by the challenged legislation. 148 N.J. Super. at 351.[3]

[2, 3] The foregoing statement was erroneous as a matter of law. If the classification bore "some relation" to the legislative objective of relief from interference with Sunday rest and relaxation, it was immune from invalidation through judicial admeasurement of a supposed preponderant inconvenience to would-be Sunday shoppers. As indicated hereinabove, the weighing of relative benefits and detriments in police power regulation is for the Legislature exclusively. In its *ratio decidendi*, however, the court appears to have partly rested on the factual conclusion that the proof adduced by plaintiffs' expert witnesses sufficed to demonstrate that the law failed in fact to serve the legislative object and purpose at all ("the classification scheme * * * has been demonstrated to have failed to legitimately advance the welfare of the general public * * *"; 148 N.J. Super. at 351). We find ourselves in distinct disagreement.

3. A serious question is presented as to the standing of plaintiffs to challenge the classification of the statute as deleterious to Sunday shoppers, the plaintiffs representing only the class of sellers. The gravamen of the trial court holding is injury to shoppers, not merchants. See *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 4 L. Ed.2d 524 (1960); *State v. Norflett*, 67 N.J. 268, 276, n. 7 (1975).

We pass the question as we are satisfied the Sunday Closing Law is valid from the standpoint of shoppers as well as merchants and believe it in the public interest to lay the question to rest.

The plaintiffs' witnesses were Dr. Yehudi Cohen, an anthropologist, Warren Travers, a traffic engineer and consultant, and Dean Boorman, a land-use planner.

As to Dr. Cohen, his testimony is virtually worthless for bias because of his avowed hostility to the policy of Sunday closing legislation, whatever the classification. The sum and substance of his testimony is that Sunday shopping is a recreational activity for women and families prevention of which to any degree is socially undesirable. Giving this witness' evidence full fact value, it in nowise tends to establish that the prohibition of Sunday sales of the prohibited categories of goods is not effective to reduce interference with the ambiance of Sunday as a day of rest and relaxation in any of the aspects recognized as fit for legitimate legislative concern in *Two Guys*. See 32 N.J. at 216, 228-229. The subjective value judgments of this witness to the subject matter represent considerations totally for the appraisal of the Legislature, not the courts.

Travers perceived the issue to be one as to whether Sunday openings for sale of the proscribed items would increase the volume of traffic on certain main highways or routes that are used by travelers in pursuit of recreation. On the basis of a highly selective set of statistics, he found they would not. Passing for the moment the question of the reliability of the studies underlying the stated conclusion, the proposition falls far short of negating the numerous other rationally perceivable bases for the legislative determination. Travel for recreation is only one, and relatively minor at that, Sunday pursuit of the populace. There are many others. As pointed out by *Two Guys* in language quoted above, the Legislature may prohibit Sunday commercial activity when it causes "hustle and bustle [to] mount and intrude unreasonably upon opportunities for rest, leisure and diversion." 32 N.J. at 216. The inroad

may consist of the increase of commercial traffic to the discomfort not only of the Sunday driver bent on recreation but of those who may be visiting or travelling for any of the other relaxing purposes for which one may be driving on the streets and highways on Sunday. The journeys and activities of Sunday shoppers and merchants may also "otherwise impinge upon a scene conducive to rest, diversion and recreation." *Id.* at 216. Thus, people strolling, cycling, jogging, or sitting in their yards or on their porches on Sunday in or near areas where stores or shopping centers are located may find the "scene" less conducive to their enjoyment of the day by the sights and sounds—the general hustle-bustle—attendant upon traffic and other accompaniments of retail selling. Travers' statistics and conclusions do not bear upon the legitimate legislative concern with any of these other reasonably conceivable effects of continued unrestricted sale of the proscribed articles.

The fact that there is inevitably a given amount of interference with Sunday rest and relaxation attendant upon permitted Sunday commercial activity (*e.g.*, sales of food, drugs, etc.), travel from "open" to "closed" counties and from out of state to "closed" counties, and the like, as pointed out by Travers, cannot derogate from the inescapable logic that for every would-be Sunday venturer on the highways whose only purpose is to purchase or shop for one or more of the proscribed items the effect of the law is highly likely to eliminate that trip. Nothing in Travers' testimony could establish the irrationality of a legislative supposition that enough of such trips are obviated by the Sunday Closing Law as to substantially further the assumed legislative objective in one or more of the respects noted above. In this regard it is significant that plaintiffs' proofs established that in "open" counties its stores' Sunday sales were generally higher than on any other day of the week.

Even in respect to the purported Travers' theme—little or no impact on recreational driving from a hypothetical Sunday opening—the supporting data are inconclusive because limited to state highways (and only a minimal sampling of those). Ignored, consequently, is the potential effect, from lifting the prohibition on sale of the proscribed types of goods, of increased Sunday motoring on local streets or roads in or near urban or suburban business districts and neighborhoods.

The testimony of the witness Boorman was imbued with the same narrow focus as that of Travers: *i.e.*, "to evaluate whether the allowance of the full opening of stores in the counties in New Jersey where the sale of certain items is prohibited on Sunday would add traffic to the highways to an extent which would interfere with recreational travel." It is therefore subject to the same conclusions of inadequacy in constitutional terms as Travers' testimony. Moreover, Boorman assumed an increase in such traffic if the law were repealed, and this in itself tends to support the legislative judgment. His conclusions that such an increase would not be too great or unduly burdensome to those seeking to enjoy Sunday are, again, obviously matters for legislative not judicial consideration.

The testimony of Travers and Boorman, as well as the opinion of the trial court, also disregards a reasonably conceivable legislative concern with the potentiality that widespread Sunday opening of stores like the plaintiffs' selling the proscribed items could well, by competitive pressure, force the Sunday opening of the considerable number of other stores selling the same kinds of articles which now elect to stay closed on Sunday. This could "snowball" into very substantial incursions upon Sunday rest and relaxation both on highways and in central city and suburban business areas and their environs. See *Gundaker Central Motors v.*

Gassert, 23 N.J. 71, 82 (1956) appeal dism. 354 U.S. 933, 77 S. Ct. 397, 1 L.Ed.2d 1533 (1957); *McGowan v. Maryland*, *supra* (366 U.S. at 541, 81 S. Ct. 1101, concurring opinion of Frankfurter, J.).

Finally, plaintiffs overlook the potential legislative concern with giving employees of stores selling the five categories of goods access to the common Sunday rest and relaxation enjoyed by the community at large. See *McGowan v. Maryland*, *supra*, 366 U.S. at 538, 81 S. Ct. 1101 (concurring opinion of Frankfurter, J.). This consideration is distinguishable from that of concern for relief from uninterrupted labor for more than six days, held in *Two Guys* to be arbitrary if limited to the five categories of goods. 32 N.J. at 218-219. If the Legislature felt that because of general voluntary closing on Sunday (except for necessary occupations) stores selling the five categories of goods were typically those seeking to be open on Sunday, then it could reasonably have been motivated, along with the other considerations already discussed herein, to make the common Sunday rest and relaxation benefits enjoyed by the public at large available also to employees of such stores.

The parties have cited decisions in other states variously invalidating and sustaining Sunday closing statutory classifications. These largely depend on the particular exemption schemes and background facts implicated. They are of limited influence in this case as the basic approach of this Court to the validity of our own statute was fixed in *Two Guys*, and we prefer to adhere to the guidelines set forth therein, as we have done in this determination.

Intervenor, Menswear Retailers of New Jersey, Inc., has invited us to consider overruling *Two Guys* to the extent that that decision held the Sunday Closing Law to have repealed by implication the prior comprehensive Sunday prohibitory legislation as set forth in the 1951 revision. Reliance is had upon the Supreme Court decisions in *Two Guys from Harrison-Allentown v. McGinley*, *supra*, and *McGowan v. Maryland*, *supra*. Although those decisions upheld the validity of later and narrower Sunday prohibitory statutes against the background of broader, more comprehensive earlier closing laws, in neither case was the question of implied repeal of the earlier by the later statute an issue. Indeed, the Court in the *McGinley* case noted that the stated issue was unsettled as a matter of Pennsylvania law. 366 U.S. at 588, 589, 81 S. Ct. 1135.

We find no reason to reconsider the holding of *Two Guys* in the respect noted.

[4] For the reasons hereinabove set forth, we conclude plaintiffs have not established the invalidity of the Sunday Closing Law on equal protection or any other grounds.[4]

II

Plaintiffs have cross-appealed[5] on the grounds: (a) the categorization of goods saleable and non-saleable under the statute is unconstitutionally vague and ambiguous; and (b) the pending prosecutions of plaintiffs sought to be enjoined by the complaint herein should be vitated because of selective enforcement and because the statute is invalid as incapable of uniform enforcement. The trial court found these contentions to lack merit. 148 N.J. Super. at 361-362.

[5, 6] We agree with the trial court that our decision in *State v. Monteleone*, 36 N.J. 93, 99 (1961), is dispositive of the first ground of the cross-appeal. The first phase of the

4. It bears reminder that by referendum the voters of any county in which the law is operative can render it nugatory therein. *N.J.S.A.* 2A:171-5.16. Two counties have taken such action since 1959.

5. It would have been more appropriate for plaintiffs ot argue these as alternative grounds to sustain the trial court's judgment rather than cross appeal as they are not aggrieved by the judgment.

second ground of appeal is rejected for the reasons set forth in the trial court's opinion. 148 N.J. Super. at 361-362. See also *Abrahams v. Civ. Serv. Comm.*, 65 N.J. 61, 74-75 (1974). As to the second phase of that ground, we find it not supportable on the record of this case, taken in entirety, and in the light of the heavy presumption of validity of a legislative enactment of substantial duration. *Schaad v. Ocean Grove Camp Meeting Association*, 72 N.J. 237, 265 (1977).

The judgment is reversed and the cause remanded to the Law Division with directions to dismiss the complaint.

SULLIVAN, J. (concurring). As the majority opinion notes, the constitutionality of Sunday closing legislation has been consistently upheld. My problem is with the classifications of goods which may not be sold at retail in those counties of the State which have adopted the provisions of the statute by referendum vote.

Because of the generality of the classifications made, I doubt whether, realistically, the law is capable of enforcement against those retail businesses which are more interested in circumventing the statute than in attempting to comply with its provisions. Despite these doubts, I would uphold the statute as written. Not only does it represent a declaration of legislative policy, but, as noted, becomes operative in a county only when adopted by the people by referendum vote. In the ten counties in which the statute is presently in effect, there is always the right to have the question of the applicability of the statute resubmitted to the electorate at the next general election.

If retail businesses are confronted with problems in the interpretation and application of the statutory classifications, this is a matter for legislative attention. The judiciary should not attempt to impose its own concept of what

is socially desirable. Subject to the foregoing, I join in the majority opinion. Justice CLIFFORD joins in this opinion.

PASHMAN, J. dissenting. I agree with the ruling below that the misnomered "Sunday Closing Law," L. 1959, c. 119, *N.J.S.A.* 2A:171-5.8 *et seq.*, is unconstitutionally arbitrary in its classification of the goods whose sale is proscribed on that "special" day of the week. Thus, I respectfully dissent from this Court's reversal of that holding. Irrespective of whether the statutory classification satisfies any of the current Equal Protection tests, it fails abysmally when subjected to scrutiny under a standard too frequently ignored by judges attracted by the intellectual allure of legal niceties incomprehensible to the public—the test of common sense. When examined from that perspective, the idyllic scenario wistfully conjured by the majority to provide the "rational basis" justifying the statutory classification is patently at odds with the realities of the commercial and consumer worlds of 1978. Assuming any "Sunday Closing" legislation with the purpose ascribed to Chapter 119 can be valid, the unreasonableness of this particular statutory manifestation should earn it the condemnation of this Court.

I

Since the facial validity of Chapter 119 was upheld by this Court in *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199 (1960), the trial court was solely concerned with its constitutionality as applied. *Furman* held that the Legislature's selection of Sunday as a day for imposing restrictions on commercial activity was a permissible exercise of the police power aimed at the protection of the welfare of the community against "unreasonable interference with the opportunity of the public to find relief from every day tensions." 32 N.J. at 216, 227-228. The Court found that the Legislature could reasonably conclude that the "public

health and welfare are implicated when the hustle and bustle mount and intrude unreasonably upon opportunities for rest, leisure and diversion," and impaired by the resulting "interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose." *Id.* at 216, 228. Although the issue is not squarely presented in this appeal, I entertain substantial doubts that legislation intended to serve such a purpose is within the police power and would reexamine the correctness of Furman's unquestioning acceptance of its legitimacy.

Ignoring for the moment the economic interests of retailers such as plaintiff who wish to sell the proscribed goods on Sunday, I believe that the statute is constitutionally defective for a totally different reason. It subjects would-be Sunday shoppers to unnecessary governmental restrictions on their harmless personal activities. This Court has recently taken great strides toward the recognition of the primary of the rights of individual autonomy and self-regulation over the paternalism of public policy. Where the state interest in regulating the personal decisions and conduct of the citizenry is less than compelling, we have struck down overzealous regulatory measures which unduly hinder the prerogatives of the individual. *Merenoff v. Merenoff*, 76 N.J. 535 (1978); *State v. Saunders*, 75 N.J. 200 (1977). In *Merenoff*, an unanimous Court held that the preservation of marital harmony was a goal whose accomplishment was best entrusted to the discretion of the marital partners. The presumed efficacy of the public policy prohibiting tort actions between spouses in advancing that wholesome goal was found insufficient to warrant its continued existence. In *Saunders*, we held that the State failed to articulate a sufficient interest to justify its regulation of the sexual activities of unmarried adults capable of making

responsible decisions on that subject for themselves. In both instances, society was telling its individual members that the apparent penalty it was imposing was "for their own good." The situation is no different here.

The State is effectively permitting those counties which have opted for this partial prohibition of Sunday sales to tell would-be consumers that they may not purchase the tabooed goods on Sunday, no matter how much they might wish to do so. The reason for this prohibition is to prevent consumers from depriving themselves and others of the opportunity to engage in the relaxation and recreation which they need. In other words, persons who, for whatever reason, might choose to shop on Sunday for the prohibited items are prevented from doing so for their own good. The apparent assumption behind this prohibition is that such persons will, by reason of their inability to shop, be effectively forced to devote their Sunday's to the recreational activity the Legislature thinks is more beneficial for them. By serving as a deterrent to Sunday shopping, the statute presumably serves as an incentive to Sunday relaxation.

The statute of course has no effect whatsoever on that segment of the community which does not wish to shop on Sunday. These persons will relax voluntarily without any legislative coaxing. However, in modern America many persons consider shopping to be a relaxing, recreational activity. The fact that so many people do shop on Sundays seriously impugns the legitimacy of Chapter 119's alleged purpose. Yet the State tells recreational shoppers that in order to make them relax on Sundays they may not purchase, among other things, clothes or furniture. Even those for whom shopping is drudgery might wish to be able to get it over with, if they so choose, on some Sunday when in-

clement weather precludes other activities. Moreover, for many persons shopping on Sunday is often a matter of necessity. To the person who works the other six days of the week, the State says you must travel to an "open" county or out of the state if you wish to buy clothes or furniture.

Concededly, there is no recognized individual "right" to shop, and an individual's interest in being free to purchase the proscribed goods on a particular day of the week is far from fundamental. Nevertheless, the State's legitimate interest in restricting the consumers' right to do so on Sunday is even less weighty. The ultimate touchstone in assessing the propriety of governmental regulation under the police power is the public need. In *Katobimar Realty Co. v. Webster*, 20 N.J. 114 (1955), this Court observed that

> the police function cannot be expressed in terms of a definitive formula that will automatically resolve every case, for its quality and scope are commensurate with the public exigencies arising from everchanging social and economic conditions. * * * The police power is the public right to reasonable regulation for the common good and welfare. [*Id.* at 122-23]

We further noted that "the exertion of the [police power] authority shall not go beyond the public need" and that "the authority coincides with the essential public need." *Id.* In my view, there is no legitimate public need to force people to relax on Sunday and to do so by disabling them from pursuing one particular type of activity. Moreover, government has no valid interest in determining what kinds of recreation should be available to individuals so long as their choice of activity is not affirmatively harmful to others.

In *Furman*, Chief Justice Weintraub, in discussing the ban of the statutory predecessor to Chapter 119 on all forms of recreation on Sunday, stated

> One is hard put to find a fair connection between such restraints and any known threat to the public health, safety, morals and welfare. * * * [I]t is difficult to find a basis under the police power for such extraordinary restraint upon individual freedom. [32 N.J. at 217]

To my mind, this succinct observation applies with equal force to Chapter 119 and any other legislative attempt to enforce one group's concept of socially beneficial Sunday behavior in the name of public welfare by proscribing the voluntary conduct of individuals who choose to pursue their happiness in some other manner. Few would seriously contend that the Legislature could constitutionally ban the sale of food on a certain day of the week in order to promote the socially desirable goal of eliminating the individual health problems caused by being overweight. Such a statute invades the zone of personal autonomy. At some point society's interest in seeing that a person does what is "best" for himself must yield to individual responsibility and free choice in making that determination. Just as the decision whether or not to eat certain foods despite their potential adverse effect on one's health is solely a matter for personal choice, so should be the decision whether to shop or to relax on Sunday.

I do not question the validity of the legislative perception that a need for "rest, leisure and diversion" exists. My concern is only whether that goal is one that the Legislature may seek to advance in the name of public welfare by invocation of the police power to limit the activities of those who choose not to relax on Sunday and want to shop or of those for whom shopping is itself recreational and relaxing. I think not. Our society might perhaps be less fractious and interpersonal relations much warmer if all persons devoted more time to unwinding from the pressures of the daily grind. However, the police power does not exist in order to sanction all governmental regulation which

arguably might bring us closer to a utopian society. Nor does it exist to afford government a privilege to exercise *quasi*-Orwellian control over its citizens. The proper role of the police power is to protect the public safety, health and welfare. It is not a license to organize individual lives by governmental fiat.

One can theorize innumerable improvements in society which all might hail as salutary developments. But not every potentially beneficial change in human behavior can be legislated by governmental regulation under the police power and thus imposed on those who would do otherwise. Such an encroachment on individual freedom must be justified by a meaningful and realistic nexus between the goal sought to be achieved and the public welfare. The goal of Sunday "rest and relaxation" has only the most tenuous and speculative connection thereto. The marginal interference with that goal caused by Sunday shopping hardly poses a realistic threat to the welfare of society. The statutory purpose is therefore insufficient to justify Chapter 119's substantial infringement on the freedom of those who might wish to shop on that day.

II

Turning to the validity of Chapter 119 as applied, I agree with the trial court that the statute's classification of the goods which may not be sold on Sunday lacks any rational basis and fails to advance the rest and relaxation objective relied upon by the *Furman* Court. In that decision, the Chief Justice wrote:

> * * * [w]e must assume * * * that the Legislature found the items dealt with by chapter 119 are ones which, above and beyond all others, are provocative of the problem; that the elimination of their sale on Sunday will remove the undue interference with the opportunity of the citizens for relief from the stress of everyday pursuits. [32 N.J. at 228-229].

Accordingly, the trial judge quite properly sought to assess the extent to which the unrestricted Sunday sale of the proscribed items would actually interfere with the opportunity of those who wished to do so to engage in relaxing or recreational pursuits. In other words, she sought to test the sustaining rationale found in *Furman* as applied to the realities of retailing today. Her conclusion that the potentially negative consequences of unlimited Sunday shopping were essentially chimerical was correct in light of both the evidence before her and common sense.

Moreover, I disagree with the majority's subjection of Chapter 119 to the less than rigorous judicial scrutiny usually reserved for governmental regulation of economic activity. Its use of the rather mechanistic analysis of the "rational basis" test [1] is peculiarly inappropriate when the Court is faced with consideration of a statute whose primary impact is a substantial infringement upon the freedom of action of many citizens of this State. The statute severely limits personal autonomy and free choice. Since Chapter

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1. In *Robinson v. Cahill*, 62 N.J. 473 (1973) *cert.* den. 414 U.S. 976, 94 S. Ct. 292, 38 L.Ed.2d 219 (1973), Chief Justice Weintraub had occasion to condemn talismanic judicial alherence to the so-called "two tiered" analysis employed by the United States Supreme Court under which only those governmental actions impinging upon "fundamental" rights are subjected to strict judicial scrutiny:

> Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or due process clauses may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.
>
> [62 N.J. at 491-492 (citations ommitted)]

The individual right implicated in the instant case, while perhaps not fundamental, is certainly one whose denial should receive more than the cursory review given today by the Court.

119 goes well beyond mere economic regulation, the validity of its classification must be measured under the test we announced in *Taxpayers Association of Weymouth Tp. v. Weymouth Tp.*, 71 N.J. 249 (1976): whether the challenged classification bears a "real and substantial relationship" to the governmental interest it is alleged to serve such as would justify its denial of an important personal right. *Id.*, at 286-287. In light of the failure of Chapter 119 to survive the less critical scrutiny of the rational basis test, its inability to meet the more exacting standard of review mandated by *Weymouth* is obvious. Only the most creative imagination could find a *substantial furtherance* of the relaxation objective of Chapter 119 by this limited restriction on Sunday shopping.

The folly of the majority's approach to this question is its foundational assumption that persons who would shop for the proscribed items and persons who would shop for the unregulated goods comprise two distinct and non-overlapping categories. Its conclusion that eliminating the ability of the former class to shop will reduce "hustle and bustle" to the small degree required to sustain the statute under the generous test the majority employs follows *a fortiori*. The crux of this holding is the "inescapable logic" of its perception that

> * * * for every would-be Sunday venturer on the highways whose only purpose is to purchase or shop for one or more of the proscribed items the effect of the law is highly likely to eliminate that trip. [See *ante* at 360]

Had it been made, that trip presumably would have "interferred to some degree with the public enjoyment of Sunday." See *ante* at 356. The allegedly self-evident nature of the majority's observation leads it to find no irrationality in the "legislative supposition that *enough* such trips are

obviated by the Sunday Closing Law as to *substantially* further the assumed legislative objective * * *." See *ante* at 360 (emphasis added). The illogic of the majority's factual premise renders the validity of its legal conclusion at best questionable.

The majority conveniently omits any discussion of the fact that Chapter 119 operates as a *partial* Sunday closing law—retailers who sell goods other than those whose Sunday sale is prohibited are free to open their stores on Sunday and to offer the unregulated goods for sale. In plaintiff's case, the only significance of Sunday is that a few departments must be roped off and closed. Non-prohibited wares are sold in the same manner as is done on the other days of the week. Vornado's employee staffing on Sunday is nearly identical to that prevailing when the store is totally open.

Consumers shop in stores offering a broad spectrum of goods for the convenience of one-stop shopping. Normal shopping lists include both proscribed and unregulated items in order to maximize the utility of one shopping venture. As plaintiff's representative stated before us at oral argument, the consumer traffic is there on Sunday just as on the other days of the week—the only difference is that the shoppers are unable to purchase the proscribed items on Sunday. To that extent, their shopping trip is not as productive as it could have been, but the trip is made nevertheless. That plaintiff and other similar retailers might enjoy a greater volume of business on Sunday in the absence of Chapter 119 would not necessarily be attributable to a greater number of shoppers.

The vast majority of shopping trips contributing to the undesirable hustle and bustle on Sundays would occur with or without the limited prohibition of Chapter 119. The

number of trips which would have the purchase of proscribed items as their sole purpose would be at most an infinitesimal addition to the number of trips already made for the purchase of unregulated goods. If the ban of Chapter 119 were eliminated, the utility of trips by those who will also buy unregulated goods would be increased. In such circumstances, it strains reason to say that the rest and relaxation objection of the statute is furthered even slightly, much less substantially, by its classification of the goods which may not be sold on Sunday. In the words of the majority's own formulation, the "anticipated benefits" to the public enjoyment of Sunday as a day of relaxation from Chapter 119 are indeed "so illusory as to stamp the legislative classification as arbitrary or capricious * * *." See *ante* at 356.

Furman held that it would have been irrational for the Legislature to perceive uninterrupted labor as an evil and have its elimination as the object of Chapter 119 and yet allow all but the proscribed goods to be sold on Sunday. 32 *N.J.* at 219, 222. In my view it is equally irrational for the Legislature to have perceived Sunday relaxation as a societal goal and have elimination of any interference therewith as the statutory object and then ban only an insignificant portion of total Sunday activities—the retail sale of five types of goods. Assuming the legitimacy of the goal Chapter 119 seeks to accomplish, its ban on Sunday activity would have to be significantly more far-reaching than it is at present before the statute could fairly be said to reasonably advance the end of maximizing the public's opportunities to enjoy blissful Sundays. While the power of the Legislature to take one step at a time in an attempt to strike at the perceived evil where it is greatest is undeniable, it is incumbent upon this Court to ensure that the step taken is an effective one—not an arbitrary singling-out of a particular activity for restrictive regulation of imaginary efficacy. All members of the public, both those who desire unrestricted shopping and those who seek relaxation on Sunday, will be "hard put" to find an element of common sense in the majority's sanctioning of this legislative charade.

One need not be clairvoyant to realize that the Sunday hustle and bustle attributable to the pursuit of recreational activities far exceeds that attributable to Sunday shopping. Furthermore, the hustle and bustle incident to shopping for the goods proscribed by Chapter 119 is small in comparison to that attributable to permitted Sunday shopping activities and pales into insignificance in comparison to that attributable to recreational endeavors. I doubt very much that a Sunday driver stuck on a jammed highway for hours in Monmouth County on a summer Sunday evening finds much solace in the fact that none of those sharing his predicament was out shopping for the proscribed goods. Nor is it likely that a similarly-situated driver in the "open" shore counties, blames his plight on the fact that Sunday shoppers for the proscribed goods have swollen the highways.

The legitimacy of Chapter 119 is further undermined by what may charitably be termed its uneven administration. The combination of its vague proscriptions and avowed recreation-promoting purpose has resulted in the anomaly that one may purchase sneakers on Sunday but not shoes. The absurdity of this state of affairs inevitably tends to breed contempt for our system of law and makes it difficult to realistically say that the relaxation object of the statute is advanced in any manner that can fairly be termed rational.

Finally, I would point out that today's decision establishes only that this plaintiff has failed on this record to demonstrate Chapter 119's unconstitutionality as applied.

The Court's stalwart defense of the statute should not deter a future attempt to meet the admittedly onerous but nevertheless not insurmountable burden of proof the majority has chosen to impose on those who would challenge that legislative excursion into benevolent paternalism.

HANDLER, J. dissenting. I dissent respectfully from the majority of our Court because I am convinced that the Sunday Closing Law, *N.J.S.A.* 2A:171-5.8 *et seq.*, contravenes the equal protection clause of our State Constitution, *N.J. Const.* (1947), Art I, par. 1. This law, in its classification of goods and operation as a regulatory scheme to discourage retail commercial activity on Sunday, does not rationally and reasonably promote the legislative purpose, as found in *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199 (1960). That purpose was said to be to foster an atmosphere of rest and recreation so that the "vast majority of the citizens" might "find surcease from the pressures of the work week on the day generally selected by them for that purpose." *Id.* at 228. The record developed in this case confirms ordinary experience. It shows that the ban of retail selling of particular goods—clothing, lumber, furniture, furnishings and appliances—in only ten of the State's twenty-one counties has had an uneven, inconstant and miniscule effect in fostering a peaceful and recreational milieu. I do not believe, therefore, that the statute can constitutionally endure in its present form.

Two Guys from Harrison, Inc. v. Furman, supra, held that the Sunday closing statutory scheme, *N.J.S.A.* 2A:171-5.8 *et seq.*, proscribing the sale on Sundays of clothing or wearing apparel, building and lumber supply materials, furniture, home, business or office furnishings and household, business or office appliances in counties which adopt its provisions by referendum, did not merely supplement but rather superceded and replaced the 1951 revision of

prior Sunday closing legislation, *N.J.S.A.* 2A:171-1 *et seq.* The Court identified two possible legitimate police power objectives of the extant Sunday closing legislation: (1) relief from uninterrupted labor for seven days a week, and (2) promoting an atmosphere conducive to rest, recreation and the relief from everyday tensions. The Court rejected the first possibility, concluding that the classification of goods was not rationally and reasonably related to providing uniformly for a single day of rest. It determined that there was no "reasonable basis for the differentiation in chapter 119 [*N.J.S.A.* 2A:171-5.8 *et seq.*] of the work area embraced in the sale of the items it proscribes from the work area it leaves untouched." *Two Guys from Harrison, Inc. v. Furman, supra*, 32 *N.J.* at 219. The Court sustained the facial validity of the law as rationally related to the second possible objective of fostering an atmosphere for peace and change from everyday routine. It found this purpose to be "unanchored to the policy" of the prior law (*id* at 223) and held that the evil inferred from the law and addressed by it was the "unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose." *Id.* at 228.

In upholding *N.J.S.A.* 2A:171-5.8 *et seq.*, the Court rebuffed an attack made on constitutional grounds that on its face the law contravened the principle of separation of Church and State, as embodied in the Federal and State constitutions, and the equal protection clauses of both constitutions. It thus reversed a judgment on the pleadings in favor of the opponents of the legislation; it also reversed a summary judgment in favor of plaintiffs to enable them to proceed to trial on the issue that the statutory classification was arbitrary and denies equal protection. *Two Guys from Harrison, Inc. v. Furman, supra*, 32 *N.J. at* 229-230. Plaintiffs here, as successors and privy to their party-

predecessors in the earlier litigation, have proceeded to trial and, in my opinion, have demonstrated and proved that the statutory attempt to enhance the efforts of the vast majority of our citizens to find respite from daily pressures is a failure.

It is fundamental that all police power legislation must conform to the State constitutional requirement of equal protection of the laws. This basic guarantee, secured by *N.J. Const.* (1947), Art I, part 1, is independent from that of the federal constitution. *Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.*, 71 *N.J.* 249 (1976), *cert. den.* 430 *U.S.* 977, 97 *S. Ct.* 1672, 52 *L.Ed.*2d 373 (1977); *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350 (1975); appeal dismissed 426 *U.S.* 901, 96 *S. Ct.* 2220, 48 *L.Ed.*2d 286 (1976); *Robinson v. Cahill*, 62 *N.J.* 473, *cert. den.* 414 *U.S.* 976, 94 *S. Ct.* 292, 38 *L.Ed.*2d 219 (1973). Moreover, federal equal protection constitutional concerns are not necessary or even highly relevant to a disposition of this case. Concededly, our federal counterparts have been most indulgent of state Sunday closing legislation. *McGowan v. Maryland*, 366 *U.S.* 420, 81 *S. Ct.* 1101, 6 *L.Ed.*2d 393 (1961); *Gallagher v. Crown Kosher Super Market of Massachusetts*, 366 *U.S.* 617, 81 *S. Ct.* 1122, 6 *L.Ed.*2d 536 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 *U.S.* 582, 81 *S. Ct.* 1135, 6 *L.Ed.*2d 551 (1961); *Braunfeld v. Brown*, 366 *U.S.* 599, 81 *S. Ct.* 1144, 6 *L.Ed.*2d 563 (1961). Impliedly, there is recognition that such legislation is distinctly a matter of unique and special local concern.

In constitutional parlance, a statutory classification devised as a means for achieving a legislative end must be rational in that, at the very least, it must have a logical nexus with the police power objective which it is designed to promote. There is, of course, a presumption that the legislature envisaged a valid classification and, indeed,

"[d]istinctions will be presumed to rest upon a rational basis if there be any conceivable state of facts which would afford reasonable support for them." *WHYY, Inc. v. Glassboro*, 50 *N.J.* 6, 13 (1967), rev'd 393 *U.S.* 117, 89 *S. Ct.* 286, 21 *L.Ed.*2d 424 (1968).

The majority of this Court is satisfied that there is a "conceivable" factual basis for the statutory distinction. It pointedly criticizes the trial court for adopting an erroneous standard for adjudging the constitutional validity of the statute. The trial court, according to the majority, failed "to establish that the classification in Sunday Closing Law, in the sense of contrast between articles permitted and articles forbidden to be sold, was devoid of any rational relationship to its validated purposes on any conceivable basis the Legislature might have entertained therefor." *Ante* at 358. In effect, the majority says that the considerable body of evidence marshalled before the trial court (which, I submit, was thoroughly digested and assimilated by that court into well-founded factual determinations and legal conclusions) failed to dispel facts showing that "the classification bore 'some relation' to the legislative objective of relief from interference with Sunday rest and relaxation * * *." *Ante* at 358.

In applying the traditional test of constitutional validity of statutory classifications on equal protection grounds, the majority has not stressed that the rational basis, which is the predicate of validity, imports reasonableness as well as the absence of irrationality or illogicality. I must iterate that the avowed purpose of the Sunday Closing Law is to repress "unreasonable interference" with the opportunities of the "vast majority of the citizens" to seek respite on Sunday as a break from the "pressures of the work week," *Two Guys from Harrison, Inc. v. Furman, supra*, 32 N.J. at 228. The Court there necessarily had to consider the problem hypo-

thetically. It assumed, therefore, "as the facts may reasonably be," that the particular items statutorily proscribed for sale on Sunday had been found by the Legislature to be the ones primarily "provocative of the problem" and that extirpating these goods from the commercial scene "will remove the undue interference with the opportunity of the [vast majority of] citizens for relief from the stress of everyday pursuits." *Id.* at 228-229.

That hypothesis is no longer tenable. As demonstrated convincingly by the record, which is confirmed by actual experience, the statutory scheme, with its classification of goods removed from sale, is inefficacious in achieving the purpose of the law to afford in a meaningful way Sunday respite for a substantial segment of the people. The trial court found on substantial and competent evidence "that the ban on the sale of the five proscribed categories of goods both fails to advance the opportunity of the general public for recreation, diversion and leisure on Sunday, and, moreover, affirmatively impedes and interferes with that opportunity." *Vornado, Inc. v. Hyland*, 148 *N.J. Super.* 343, 352 (Law Div. 1977).

The majority's rejoinder on this crucial facet of the case is inadequate. Its treatment of the considerable evidence adduced below is somewhat captious; it is unresponsive to the point that the ban on the Sunday sales of the five categories of goods has not had a meaningful effect upon reducing "hustle and bustle" for a substantial portion of the population or that conversely removing that ban would not measurably change the Sunday scene for a large majority of people. It is no answer merely to assert that it was not shown that the prohibition of the Sunday sales of the designated class of goods was not "effective to reduce interference with the ambiance of Sunday as a day of rest and relaxation * * *." *Ante* at 359; or that there is "inescapable logic that for every

would-be Sunday venturer on the highways whose only purpose is to purchase or shop for one or more of the proscribed items the effect of the law is highly likely to eliminate that trip." *Ante* at 360. The evidence and findings of the trial court do show, contrary to the majority's view, "the irrationality of a legislative supposition that enough * * * [commercial] trips are obviated by the Sunday Closing Law as to substantially further the assumed legislative objective * * *." (*Id.*)

The legislative objective, to repeat, was to fashion for a "vast majority" of our citizens freedom from unreasonable and undue interference with their ability to find a break from the weekday routine. It is no longer permissible to conceive by stretching one's imagination, that there are facts to support rationally and reasonably this legislative hope. In light of a made record and ordinary experience, the constitutional issue cannot any longer be relegated to the realm of supposition or hypothesis. The assumption of a reasonable and rational basis for this legislative approach for securing respite on Sundays has been dispelled and I would declare the law unconstitutional.

To be added to this primary thesis is another point. It ought not to be disregarded by our Court that the Sunday closing legislation does impact upon areas of personal privacy and freedom. It is true that laws of this character have been regarded as dealing with the "public health, safety, morals and welfare." *Two Guys from Harrison, Inc. v. Furman, supra*, 32 *N.J.* at 226. The statute, however, is two-dimensional in its purpose and application. Though directed toward the conventional governmental police power concerns of the "public health and welfare," (*id.* at 216), the statute trenches upon areas ordinarily reserved for individual autonomy, *i.e.*, what people should be free to do with themselves on Sunday. In this vein, it matters not

that the regulatory scheme is permissive as well as restrictive. As noted in *People v. Abrahams*, 40 *N.Y.* 2d 277, 284, 386 *N.Y.S.* 2d 661, 665, 353 *N.E.*2d 574, 578 (Ct. App. 1976), "[t]o provide a day of rest it is necessary in modern society both to permit and to prohibit." As similarly and aptly put in *Two Guys from Harrison, Inc. v. Furman*, *supra*, 32 *N.J.* at 223, the statute "denounces but a part of the commercial scene and leaves untouched the right of the individual to follow recreational and other pursuits." The focus of the statute is Sunday activity. Twenty or so years ago, when the current law was enacted, the specialness of Sunday as a day reserved for the expression and fulfillment of individuality was keenly felt.

> • • • Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance, it is a secular holiday, a day for play, hobbies, recreation or relaxation. To still others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning. [*Two Guys from Harrison, Inc. v. Furman, supra*, 32 N.J. at 216.]

To this it may be added that Sunday is a day for shopping for a great many people and for those who are so minded this activity, depending upon individual circumstances, is necessitous, convenient, diversionary and recreational, at bottom reflecting the myriad personal wishes and subjective choices of individuals.

An exercise of the statutory police powers, which blankets so pervasively the privacy and autonomy of individuals,

must be approached critically; its effectiveness as a social tool must be assessed with realism. Some of the reasons were sensed in a Sunday closing law case, *Skag-Way Dep't. Stores, Inc. v. Omaha*, 179 *Neb.* 707, 712, 140 *N.W.*2d 28, 31-32 (Sup. Ct. 1966):

> The difficulties of classification under modern conditions lead us more in the direction of individual persuasion and private conscience as the proper solution of the complex problem. And it might well be said that it is not the province of the state and its subdivisions in the exercise of its police power to invade the realm of private conscience except where it is incidental to the proper exercise of the police power.

Accord, *Rutledge v. Gaylord's Inc.*, 233 Ga. 694, 699-701, 213 *S.E.*2d 626, 630-631 (Sup. Ct. 1975) (Gunter, J., concurring).

I would not, therefore, be content to rest this case solely upon the grudging constitutional test of whether one can divine any conceivable state of facts which rationally supports the legislative scheme. This is the kind of case where the rigid bounds of constitutional appraisal should be loosened just because it is so difficult to unravel the weave of intersets caught by the legislation. I would invoke the precepts articulated by Chief Justice Weintraub in *Robinson v. Cahill, supra*, 62 *N.J.* at 491-492:

> • • • Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so

require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial. See, for example, *Jones v. Falcey*, 48 N.J. 25, 39-40 (1966); *Independent Electricians and Electrical Contractors' Association v. New Jersey Board of Examiners of Electrical Contractors*, 48 *N.J.* 413, 423-427 (1967); *Jackman v. Bodine*, 55 *N.J.* 371, 382-383 (1970).

I have little hesitancy in concluding that the nature of the restraint embraced in the Sunday closing law is not matched by an adequate governmental justification or counterpoised by a sufficient public need.

For these reasons, I dissent. Justice PASHMAN joins in this dissent.

SULLIVAN and CLIFFORD, JJ., concurring in the result.

For reversal and remandment—Chief Justice HUGHES, Justices SULLIVAN, CLIFFORD and SCHREIBER and Judge CONFORD—5.

For affirmance—Justices PASHMAN and HANDLER—2.

APPENDIX B

2A:171-5.8 Retail, wholesale or auction sale of certain articles on Sunday prohibited; violators as disorderly persons; penalties

On the first day of the week, commonly known and designated as Sunday, it shall be unlawful for any person whether it be at retail, wholesale or by auction, to sell, attempt to sell or offer to sell or to engage in the business of selling, as hereinafter defined, clothing or wearing apparel, building and lumber supply materials, furniture, home or business or office furnishings, household, business or office appliances, except as works of necessity and charity or as isolated transactions not in the usual course of the business of the participants.

Any person who violates any provision of this act is a disorderly person and upon conviction for the first offense, shall pay a fine of $25.00; and for the second offense, shall pay a fine of not less than $25.00 or more than $100.00 to be fixed by the court; and for the third offense, shall pay a fine of not less than $100.00 or more than $200.00 to be fixed by the court or, in the discretion of the court, may be imprisoned for a period of not more than 30 days, or both; and for the fourth or each subsequent offense, shall pay a fine of not less than $200.00 or more than $500.00 to be fixed by the court or, in the discretion of the court, may be imprisoned for a period of not less than 30 days or more than 6 months, or both. A single sale of an article or articles of merchandise of the character hereinabove set forth to any 1 customer, or a single offer to sell an article or articles of such merchandise to any 1 prospective customer, shall be deemed to be and constitute a separate and distinct violation of this act.

2A:171-5.9 Additional penalties; nuisance

In addition to the penalties hereinabove provided in case of conviction under section 1 of this act,[1] upon any 4 convictions for violations of this act, the premises in or upon which the violation occurred shall be deemed a nuisance.

2A:171-5.10 Definitions

The following definitions are not to be deemed as all inclusive and shall apply for the words or terms used in this act unless other meaning is clearly apparent from the language or context:

"Person" includes natural persons, firms, partnerships, corporations, associations or other artificial bodies, forms of business designated or known as co-operatives, trustees, receivers and officers, employees, agents, and others acting for or on behalf of any person.

"Clothing and wearing apparel" includes any article or articles to be worn on the person by man, woman, or child as bodily covering or protection, including garments of all types, headwear and footwear.

"Furniture" includes all articles of furniture used inside or outside a house or office; including chairs, tables, beds, desks, wardrobes, dressers, bureaus, cupboards, cabinets, bookcases, sofas, couches, and related items; and materials especially designed and prepared for assembly into furniture; and all such furniture whether finished or unfinished, painted or unpainted.

"Home furnishings" includes items of equipment and furnishings used in a home or office ,such as floor coverings, lamps and lighting fixtures, household linens, drapes, blinds, curtains, mattresses, bed coverings, mirrors, china, kitchenware and kitchen utensils, silverware, cutlery.

"Household appliances" includes stoves, heating devices, cooking equipment, refrigerators, air conditioning equipment, electric fans, clocks, radios, toasters, television sets, washing machines, driers, and all such electrical and gas appliances used in the home.

"Building and lumber supply materials" includes all items used in the construction of buildings, whether residential, or industrial and, particularly, but not limited to lumber, cement, building blocks, sashes, frames, windows, doors and related items.

"Sell" means to enter into an agreement whereby the seller transfers ownership or property in the goods or an interest in the goods to the purchaser for a consideration, whether or not the transfer is for immediate or future delivery, and whether or not the transaction is regarded as absolute, conditional or secured, and whether or not immediate consideration is paid therefor. The acceptance of a deposit for future delivery of any such merchandise, or an agreement for future delivery of any such merchandise, whether or not immediate consideration is paid therefor, shall also be deemed a sale for purposes of this act.

"Offer to sell" means the acceptance of bids or proposals for the purchase of goods at a future date or the attempt to induce a sale as hereinabove defined, or the attempt to induce an immediate transfer of any such merchandise, but not to include advertising or display of any such merchandise which merchandise is not available for purchase on Sunday.

"Engage in selling" means the attempt to sell or to induce an immediate or future transfer of any such merchandise by describing, explaining, extrolling or identifying any such merchandise while the seller is in personal contact with the potential purchaser.

2A:171-5.11 Additional remedy; liability of corporate officers and employees

This act shall be construed as an additional remedy to secure proper Sunday observance and the directors, officers, managers, agents or employees of corporations shall be personally liable for the penalties hereinabove provided.

2A:171-5.12 Effective date; operative in counties upon adoption by voters; referendum

This act shall take effect immediately but shall not become operative in any county unless and until the voters of the county shall determine by referendum held pursuant to this act that the same shall apply therein.

2A:171-5.13 Petition for county referendum

In any county in which there shall be filed with the county clerk prior to the forty-fifth day preceding a general election, a petition signed by not less than 2,500 registered voters of the county requesting that there shall be submitted to the voters of the county a public question to the effect that this act shall apply in said county, said question shall be submitted to the voters of said county at such election.

2A:171-5.14 Ballot; form of question

There shall be printed on each official ballot to be used at such election, the following:

If you favor the proposition printed below make a cross (×), plus (+) or check (√) in the square opposite the word "Yes." If you are opposed thereto make a cross (×), plus (+) or check (√) in the square opposite the word "No."

	Yes.	Shall the Sunday Closing Law (P.L. 1959, c. . . . .) apply within this county?
	No.	

The chapter number of this act shall be inserted in the appropriate blank in said question.

In any municipality in which voting machines are used, the question shall be placed upon the official ballots to be used upon the voting machines without the foregoing instructions to the voters and shall be voted upon by the use of such machines without marking as aforesaid.

2A:171-5.15 Majority vote

If at the election at which such question is submitted as provided in this act the majority of all the votes cast, both for and against such question, in said county, shall be cast in favor of the question, the provisions of this act shall be operative in such county upon November 15 succeeding the date of the holding of said election, but if a majority of all such votes shall be cast against the question, the provisions of this act shall remain inoperative in such county.

A2:171-5.16 Resubmission of question after approval

If in any county in which, by referendum of the voters therein, the provisions of this act shall apply, there shall be filed with the clerk of the county a petition signed by at least 10% of the registered voters of the county, requesting that there shall be again submitted to the voters of the county the question of whether the provisions of this act shall apply within the county, said question shall be submitted to the legal voters of the county at the next general election succeeding the forty-fifth day following the date

of the filing of said petition in the same manner and form as provided in section 7 of this act.[1]

2A:171-5.17 Resubmission of question after defeat of proposal

If, in any county in which by referendum of the voters therein the provisions of this act do not apply, there shall be filed with the clerk of the county a petition signed by at least 10% of the registered voters of the county requesting that there shall again be submitted to the voters of the county, the question of whether the provisions of this act shall apply within the county, said question shall be submitted to the legal voters of the county at the next general election succeeding the forty-fifth day following the date of the filing of said petition in the same manner and form as provided in section 7.[1]

2A:171-5.18 Time for resubmission

No petition for the holding of a referendum under this act shall be received, and no question shall be submitted pursuant to this act, within 3 years of the date of any election at which a question was submitted to the voters of the county pursuant to this act.

APPENDIX C

ORDER

No member who voted with the majority having moved, the petition for rehearing is dismissed.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 5th day September, 1978.

By: /s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk

APPENDIX D-1

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 6, 1978)

NOTICE IS HEREBY GIVEN that Vornado, Inc., a corporation of the State of Delaware, t/a Two Guys, Gerald Vitiello, Joseph Hopmayer, Stuart Levine, Louis Mercado, Thomas G. Stramara, and Alan Ledden, the appellants above named, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Supreme Court of New Jersey of July 18, 1978, and the denial of a petition for rehearing filed by the appellants therein on September 5, 1978, said Final Judgment reversing the judgment of the trial court and holding the Sunday Closing Law, NJSA 2A:171-5.8 et seq., (L. 1959, *c.* 119), to be constitutional.

TAKE FURTHER NOTICE that this appeal is taken pursuant to 28 USC §1257 (2).

JONES, CUCCIO & KLINGER
Attorneys for Vornado, Inc.,
t/a Two Guys, et al,
Appellants

By: /s/ Frank J. Cuccio
FRANK J. CUCCIO
A Member of the Firm

JONES, CUCCIO & KLINGER
45 Essex Street
Hackensack, New Jersey 07602
(201) 487-3000
Attorneys for Appellants
Jack Dashosh, Esq. of Counsel

APPENDIX D-2

REQUEST TO CERTIFY AND TRANSMIT RECORD

TO: STEPHEN W. TOWNSEND, ACTING CLERK
SUPREME COURT OF NEW JERSEY
P. O. Box 1480
State House Annex
Trenton, New Jersey 08625

PLEASE TAKE NOTICE that pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States you are requested to certify and transmit to the Supreme Court of the United States, the entire record of the proceedings herein.

JONES, CUCCIO & KLINGER
Attorneys for Vornado, Inc.,
t/a Two Guys, et al,
Appellants

By: /s/ Frank J. Cuccio
FRANK J. CUCCIO
A Member of the Firm

JONES, CUCCIO & KLINGER
45 Essex Street
Hackensack, New Jersey 07602
(201) 487-3600
Jack Dashosh, Esq., of counsel

APPENDIX D-3
AFFIDAVIT OF SERVICE
(Filed October 6, 1978)

STATE OF NEW JERSEY)
) SS
COUNTY OF BERGEN)

LORI CANNARIATO, of full age, being duly sworn, according to law, upon her oath, deposes and says:

1. I am employed as a secretary by the firm of Jones, Cuccio & Klinger, attorneys for Plaintiffs-Respondents-Cross-Appellants, in the within cause.

2. On October 4, 1978, I personally served Notice of Appeal to the Supreme Court of the United States and Request to the Clerk of the New Jersey Supreme Court to Certify and Transmit Entire Record of Dockets A-149/150/151/152 September Term 1977 to Clerk, Supreme Court of the United States, by certified mail, return receipt requested, with postage prepaid, upon all counsel and governmental instrumentalities included on the list annexed hereto as Exhibit A.

By: /s/ Lori Cannariato
LORI CANNARIATO

NOTARIZED

JONES, CUCCIO & KLINGER
45 Essex Street
Hackensack, New Jersey 07602
(201) 487-3600
Jack Dashosh, Esq., of counsel

EXHIBIT A
(Annexed to Foregoing Affidavit of Service)

Seymour Chase, Esquire Attorney for Defendant-Appellant, City of Hackensack

Edward R. Evans, Esquire Attorney for Defendant, Borough of Lodi

Anthony J. Sciuto, Esquire Attorney for Defendant, City of Garfield

Robert C. Aurieumma, Esquire Attorney for Defendant, Township of North Bergen

Norman A. Doyle, Jr., Esquire Attorney for Defendant-Appellant, Town of Kearny

James J. Gruccio, Esquire Attorney for Defendant, City of Vineland

Edward G. Rosenblum, Esquire Attorney for Defendant-Appellant, Menswear Retailers of New Jersey, Inc.

Erminie L. Conley, Deputy Attorney General Attorney for Respondent, William F. Hyland, Attorney General of New Jersey

Robert Alan Vort, Esquire Attorney for *amicus curiae*, American Civil Liberties Union of New Jersey

Robinson, Wayne and Greenberg, Esquires Attorneys for *amicus curiae*, Hahne and Company

Ravin, Davis & Sweet, Esquires Attorneys for *amicus curiae*, Small Retailers for Sunday Opening

Clapp and Eisenberg, Esquires Attorneys for *amicus curiae*, B. Altman and Company, *et al*

Kimmelman, Wolff and Samson, Esquires Attorneys for *amicus curiae*, The New Jersey Committee for Full Sunday Shopping

Lum, Biunno & Tompkins, Esquires Attorneys for *amicus curiae*, R. H. Macy and Company, Inc., *et al*

Municipal Prosecutor and Clerk of the Municipal Court of Rockaway Township

Municipal Prosecutor and Clerk of the Municipal Court of East Brunswick

Municipal Prosecutor and Clerk of the Municipal Court of Lodi

Municipal Prosecutor and Clerk of the Municipal Court of Montclair

Municipal Prosecutor and Clerk of the Municipal Court of Morris Plains

Municipal Prosecutor and Clerk of the Municipal Court of North Bergen

Municipal Prosecutor and Clerk of the Municipal Court of South Plainfield

Municipal Prosecutor and Clerk of the Municipal Court of Vineland

Municipal Prosecutor and Clerk of the Municipal Court of Watchung

Municipal Prosecutor and Clerk of the Municipal Court of Wayne

Municipal Prosecutor and Clerk of the Municipal Court of Woodbridge

Municipal Prosecutor and Clerk of the Municipal Court of Hackensack

Municipal Prosecutor and Clerk of the Municipal Court of Kearny

Municipal Prosecutor and Clerk of the Municipal Court of Hanover

Municipal Prosecutor and Clerk of the Municipal Court of Newark

Municipal Prosecutor and Clerk of the Municipal Court of Totowa